86-1588

No. _____

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANIEL J. McCARTHY, DANIEL VASQUEZ and ROBERT BORG, Petitioners,

v.

JOSEPH TOUSSAINT, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court has jurisdiction in a civil rights action under 42 U.S.C. § 1983 to order state prisoners released from segregated confinement to less restrictive, general population, custody.

2. Whether state prison officials who elect to provide prisoners with access to the courts by establishing prison law libraries must also provide legal assistance at state expense to dangerous segregation prisoners who are provided paging, but not unlimited browsing access, to an adequate prison law library.

LIST OF PARTIES

The parties to the proceedings below were petitioners, Daniel J. McCarthy, Daniel Vasquez and Robert Borg. Daniel J. McCarthy is the Director of the California Department of Corrections. Daniel Vasquez is the Warden of San Quentin State Prison, and Robert Borg is the Warden of Folsom State Prison. Respondents here and below are Joseph Toussaint, and the class of prisoners confined in segregation housing units at San Quentin and Folsom State Prisons.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	
I. The Ninth Circuit's Decison That a District Court may Order State Prisoners Released from Segregation to Less Restrictive Confinement in an Action Under 42 U.S.C. § 1983 Conflicts with Decisions of this Court and Other Circuits and Raises an Important, Unresolved Issue of Federal Jurisdiction.	10
II. The Ninth Circuit's Decision Requiring That Dangerous Segregation Prisoners Provided Paging Access to a Prison Law Library for Security Reasons Be Provided Legal Assistance Unreasonably Extends State Prisoners' Right of Access to the Courts and Conflicts in Principle with Decisions of Other Circuits.	16
CONCLUSION	28
APPENDIX	

TABLE OF AUTHORITIES

Cases:	Page
Allen v. McCurry 449 U.S. 90 (1980)	15
Arsberry v. Sielaff 586 F.2d 37 (7th Cir. 1978)	23
Boudin v. Thomas 732 F.2d 1107 (2nd Cir. 1984)	12
Bounds v. Smith 430 U.S. 817 (1977)	16, 17
Caldwell v. Miller 790 F.2d 589 (7th Cir. 1986)	25
Campbell v. Miller 787 F.2d 217 (7th Cir. 1986)	24, 25
Green v. Ferrell 801 F.2d 765 (5th Cir. 1986)	23
Hooks v. Wainwright 775 F.2d 1433 (11th Cir. 1985)	25
Humphrey v. Cady 405 U.S. 504 (1972)	15
In re Bonner 151 U.S. 242 (1894)	15
Jackson v. Carlson 707 F.2d 943 (7th Cir. 1983)	12
Krist v. Ricketts 504 F.2d 887 (5th Cir. 1974)	13
McCall-Bey v. Franzen 777 F.2d 1178 (7th Cir. 1985)	12
McCollum v. Miller 695 F.2d 1044 (7th Cir. 1982)	13

Cases continued:

	Page
Monroe v. Pape 365 U.S. 167 (1961)	13
Streeter v. Hopper 618 F.2d 1178 (5th Cir. 1980)	13
Toussaint v. McCarthy 597 F.Supp. 1388 (N.D.Cal. 1984)	4, 6
Toussaint v. McCarthy 801 F.2d 1080 (9th Cir. 1986)	7, 8
Wolff v. McDonnell 418 U.S. 539 (1974)	16

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Petitioners, Daniel J. McCarthy, Director of the California Department of Corrections, Daniel Vasquez, Warden of San Quentin State Prison, and Robert Borg, Warden of Folsom State Prison, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 30, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 801 F.2d 1080 and is reprinted in the appendix

submitted with this petition (Appendix, pp. 1-136).

Also reproduced in the appendix submitted with this petition is the order filed by the Ninth Circuit on December 31, 1986, denying respondents' petition for rehearing and suggestion for rehearing en banc (Appendix, p. 300).

The findings of fact, conclusions of law, order of reference and judgment of permanent injunction of the United States District Court for the Northern District of California (Weigel, D. J.) are reported at 597 F.Supp. 1388 and are reproduced in the appendix submitted with this petition (Appendix, pp. 137-299).

JURISDICTION

The Ninth Circuit rendered its opinion and entered judgment on September 30, 1986. The Ninth Circuit denied respondents' petition for rehearing and suggestion for rehearing en banc on December 31, 1986. This petition is timely filed within ninety

days of that date.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are 28 U.S.C. §§ 2241 and 2254 and 42 U.S.C. § 1983. These statutes are reproduced in the appendix submitted with the petition (Appendix, pp. 301-309).

STATEMENT OF THE CASE

This civil rights class action under 42 U.S.C. § 1983 began in 1973 on behalf of prisoners confined in administrative segregation in four California Prisons: San Quentin, Folsom, the Deuel Vocational Institution at Tracy, and the Correctional Training Facility at Soledad. Petitioners, the Director of the California Department of Corrections, and the Wardens of San Quentin and Folsom, are named defendants.

The original complaint in the proceeding below was filed in the United

States District Court for the Northern District of California in 1973. Jurisdiction in the district court was predicated on 28 U.S.C. §§ 1343(4) and 2201. By later amended complaints, the class of prisoner plaintiffs sought declaratory and injunctive relief against conditions and practices in administrative segregation units at the four California prisons. The prisoner plaintiffs also sought procedural safeguards for administrative segregation placement and retention decisions.

In October 1984, the district court issued a permanent injunction governing conditions of confinement and administrative segregation placement and retention procedures at San Quentin and Folsom.[1/] Toussaint v. McCarthy, 597

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1. This case has a lengthy procedural history involving the earlier issuance of preliminary injunctions, Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976) and Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983), and the resulting (Footnote 1 continued on following page)

F.Supp. 1388 (N.D.Cal. 1984). The permanent injunction, among other things, continued and expanded upon the detailed procedures for segregation decisionmaking required by Wright v. Enomoto, 462 F.Supp. 397, 404-405 (N.D.Cal. 1976), and required extensive improvements in conditions in segregation units.[2/]

In relevant part, the district court ordered prison officials to provide segregation prisoners with direct access to prison law libraries, but permitted prison officials to deny direct library access to segregation prisoners for compelling

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(Footnote 1 continued)
appeals to this Court, Enomoto v. Wright, 434 U.S. 1052 (1978) and to the Ninth Circuit, Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981), and Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984).

2. The permanent injunction governs conditions and practices at San Quentin and Folsom only, because a scheduling order limited trial on the merits to those two institutions. Segregation units at Deuel Vocational Institution and the Correctional Training Facility are still subject to a preliminary injunction. Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983).

security reasons. The permanent injunction required prison officials to provide segregation prisoners with a list of the law library's contents and to obtain promptly at least five law books per week requested by any segregation prisoner denied physical access to the library for security reasons. Toussaint v. McCarthy, 597 F.Supp. at 1424.

The district court also appointed a special master, known as the Monitor, to oversee and report on compliance with the permanent injunction. Toussaint v. McCarthy, 597 F.Supp. at 1420-22, 1425-27. The district court empowered the Monitor to order prisoners released from segregation during the period, known as the interim period, when conditions in the segregation units remained below constitutional minima. Id. at 1426-27.

The Ninth Circuit affirmed in part, reversed in part, vacated in part, and remanded in part the district court's

permanent injunction. Toussaint v. McCarthy, 801 F.2d 1080 (9th Cir. 1986). In relevant part, however, the Ninth Circuit ruled that the district court did not exceed its jurisdiction in this civil rights action by authorizing the release of prisoners from segregation. 801 F.2d at 1102-1103. Although the Ninth Circuit limited the possibilities for the district court's use of any segregation release powers during the interim period by vacating the provision of the permanent injunction authorizing the Monitor to release prisoners from segregation, the Court of Appeals remanded the due process issue to the district court to determine the need for any additional relief, including review of prison officials' segregation decisions, warranted by any finding of petitioners' unwillingness to adhere to the procedures required by the Ninth Circuit. 801 F.2d at 1106, n. 26, 1114.

The Ninth Circuit also held in pertinent part that prison officials must provide legal assistance to any segregation prisoner denied physical access to a prison law library for security reasons. Toussaint v. McCarthy, 801 F.2d 1108-10, 1114. The Ninth Circuit ruled that prisoners denied physical access to the law library are entitled to as yet undefined legal assistance. In so ruling, the Court of Appeals rejected the contention that a "paging" system, which permitted segregation prisoners to request and to have delivered to them law books, adequately protected the right of access to the courts of prisoners denied physical access to a library. 801 F.2d at 1109-10. Accordingly, the Ninth Circuit affirmed that provision of the district court's permanent injunction requiring prison officials to permit segregation prisoners physical access to a law library, but the Court of Appeals reversed the provision

permitting prison officials to rely on a paging system for satisfaction of the right of access to the courts of segregation prisoners denied physical access to the law library for security reasons. 801 F.2d at 1114.

REASONS FOR GRANTING THE WRIT

I

THE NINTH CIRCUIT'S DECISION THAT A DISTRICT COURT MAY ORDER STATE PRISONERS RELEASED FROM SEGREGATION TO LESS RESTRICTIVE CONFINEMENT IN AN ACTION UNDER 42 U.S.C. § 1983 CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS AND RAISES AN IMPORTANT, UNRESOLVED ISSUE OF FEDERAL JURISDICTION.

For the "interim period" during which conditions in petitioners' segregation housing units remain below constitutional minima, the district court retained the power to order certain prisoners released from segregation to less restrictive, or general population, confinement. Although the Ninth Circuit curtailed the district court's possibilities for use of this release power, the Ninth Circuit held that the relevant federal habeas corpus statutes and this Court's decision in Preiser v. Rodriguez, 411 U.S. 475 (1973), did not preclude the issuance of orders releasing prisoners from administrative segregation

in actions under 42 U.S.C. § 1983. Accordingly, the Ninth Circuit concluded that a federal district court has jurisdiction in a Section 1983 civil rights action to order prisoners released from segregation. This ruling conflicts with Preiser and decisions by other circuits. For this reason, the Ninth Circuit's decision warrants this Court's plenary consideration.

In Preiser, this Court ruled that a prisoner's challenge to the fact or duration of his imprisonment must be brought under 28 U.S.C. §§ 2241 and 2254, the relevant habeas corpus statutes, not in a civil rights action under 42 U.S.C. § 1983. 411 U.S. at 489-91, 500. Simply put, Preiser held "...that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment,

his sole federal remedy is a writ of habeas corpus." 411 U.S. at 500.

When a state prisoner seeks release from segregation, claiming that his placement there violates due process or other constitutional rights, the prisoner seeks a determination that he is entitled to immediate release or a speedier release from that segregated confinement. A state prisoner challenging his placement or retention in segregation challenges the fact or duration of his imprisonment there instead of the prison's less restrictive general population. For this reason, as several circuits have recognized, a state prisoner seeking release from segregation must challenge his confinement there by a petition for writ of habeas corpus, not by an action for injunctive relief under the Civil Rights Act. McCall-Bey v. Franzen, 777 F.2d 1178, 1191 (7th Cir. 1985); Boudin v. Thomas, 732 F.2d 1107, 1111 (2nd Cir. 1984); Jackson v. Carlson, 707 F.2d 943,

946 (7th Cir. 1983); McCollum v. Miller, 695 F.2d 1044, 1046 (7th Cir. 1982); Streeter v. Hopper, 618 F.2d 1178, 1181 (5th Cir. 1980); Krist v. Ricketts, 504 F.2d 887-88 (5th Cir. 1974). The Ninth Circuit's decision conflicts with these decisions by the Seventh, Second and Fifth Circuits.

As in Preiser, the question here is of considerable importance. For if the Ninth Circuit's decision stands, a state prisoner seeking release from segregation in an action under the Civil Rights Act need not first exhaust state administrative and judicial remedies. Monroe v. Pape, 365 U.S. 167, 183 (1961). If, however, habeas corpus is the exclusive remedy, a prisoner seeking release from segregation may not ask for federal intervention without first requesting and being denied relief in the state courts.

The conflict created by the Ninth Circuit's decision means that state

prisoners seeking release from segregation within the Ninth Circuit will have direct access to federal court in actions for injunctive relief under 42 U.S.C. § 1983. State prisoners seeking the same relief in the Second, Fifth and Seventh Circuits, however, will be required to exhaust state remedies before gaining access to federal court by petitions for writs of habeas corpus. Thus, the Ninth Circuit's decision creates a right of direct access to federal court, a form of relief denied state prisoners in at least three other circuits. This anomaly requires resolution by this Court.

In holding that the habeas corpus statutes, as interpreted in Preiser, do not deprive a federal court of jurisdiction to release state prisoners from segregation in civil rights actions, the Ninth Circuit overlooked the purpose of the great writ. "The purpose of a federal writ of habeas corpus is not to redress civil injury, but

to release the applicant from unlawful physical confinement." Allen v. McCurry, 449 U.S. 90, 104 (1980). Unlawful physical confinement may include confinement in the wrong institution. Humphrey v. Cady, 405 U.S. 504 (1972); In re Bonner, 151 U.S. 242 (1894). Logically, unlawful physical confinement must also include wrongful confinement in the most restrictive unit of an institution. Because release from segregation to less restrictive confinement falls within the traditional core of habeas corpus, the Ninth Circuit erred in its conclusion that federal courts have jurisdiction to order the release of state prisoners from segregated confinement in actions under 42 U.S.C. § 1983.

The Ninth Circuit's erroneous ruling creates a need for conformity among the circuits regarding the limits on the jurisdiction of federal courts in civil rights actions brought by state prisoners seeking release from segregated

confinement. The question raised by the Ninth Circuit's decision is of considerable public importance, because of the State's significant interest in internal prison administration, particularly the assignment of prisoners to segregation. For these reasons, a grant of certiorari is compelled.

II

THE NINTH CIRCUIT'S DECISION REQUIRING THAT DANGEROUS SEGREGATION PRISONERS PROVIDED PAGING ACCESS TO A PRISON LAW LIBRARY FOR SECURITY REASONS BE PROVIDED LEGAL ASSISTANCE UNREASONABLY EXTENDS STATE PRISONERS' RIGHT OF ACCESS TO THE COURTS AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUITS.

This Court has stated several times that prisoners enjoy a fundamental right of access to the courts. Bounds v. Smith, 430 U.S. 817, 821 (1977); Wolff v. McDonnell, 418 U.S. 539, 578-79 (1974). In Bounds, this Court held that the right of access to the courts imposed upon states an affirmative obligation to assist prisoners

in the preparation and filing of meaningful legal papers by establishing adequate law libraries or providing adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. at 828. This case concerns the means of access to an adequate prison law library by maximum security segregation prisoners deemed too dangeous for personal visits to a library.

This case involves conditions and practices in the maximum security segregation housing units at San Quentin and Folsom state prisons, the highest security housing units in two of the State's maximum security prisons. These units typically house the most dangerous and violent offenders, many of whom have assaulted other inmates or prison staff. Prison officials do not permit some of these inmates direct personal access to a prison law library for security reasons. Precisely for that reason, the Ninth Circuit has ruled that prison officials

must give these dangerous felons a benefit not provided to any other inmates, especially those who conform their behavior to prison rules: the right to legal assistance from persons trained in the law. The Ninth Circuit's ruling thus turns accepted penological practice on its head.

In Bounds, North Carolina prison officials contended that the Constitution required only that they not restrict inmate communications on legal problems. There, North Carolina objected to the requirement that it expend state funds to implement affirmatively prisoners' right of access to the courts. Id. at 823. Thus, although Bounds generally prescribed prison officials' obligations to assist prisoners in the preparation of legal papers, it did not address the question here. That is whether something other than direct physical access to a prison law lirary adequately protects prisoners' right of access to the courts.

California has adequate prison law libraries. Prison officials, however, restrict direct physical access to their law libraries for segregation prisoners deemed too dangerous for transportation to central prison libraries. Instead, prison officials allow those inmates who pose threats to institutional security to request and obtain for use in their cells law books from prison libraries. Prison officials also provide upon request a list of their libraries' contents, including reference and basic source materials, for use by those inmates denied physical library access.

A library paging system of this type provides access to legal materials functionally equivalent to direct access. Prisoners using a paging system are able to determine from a list of the library's contents which materials to request, as prisoners provided direct access may learn from searches of the library's card

catalogues. Segregation prisoners may also consult basic sources and reference materials in their cells to determine what case law materials, if any, to review in support of their claims. These prisoners may then obtain case materials as needed by an exact cite paging system and check subsequent histories with material available upon request from the library. Thus, segregation prisoners may have library access equivalent to that of general population prisoners.

Despite the affirmative steps taken by California prison officials to assist segregation prisoners in the preparation and filing of legal papers and the similarity between a paging system and physical access, the Ninth Circuit held that segregation prisoners denied physical access to prison law libraries must also be provided with legal assistance from persons trained in the law. The Ninth Circuit's decision requires California prison

officials to provide prisoners both, rather than one, of the alternative options presented by Bounds. The Ninth Circuit so ruled even though Bounds did not expressly require direct physical access to a law library for protection of prisoners' right of access to the courts. Ironically, the Ninth Circuit's decision also rewards the most incorrigible and violent prisoners in California.

Accepted penological practice dictates that prisoners be rewarded for positive, conforming behavior, not for conduct that threatens the lives of inmates and prison staff or institutional security. The Ninth Circuit's ruling, however, encourages prisoners to disrupt prison security or to assault others, especially if they are already in segregation, in order to get legal assistance for collateral attacks on their convictions or other legal actions. This dangerous precedent warrants this Court plenary consideration.

The Ninth Circuit's decison also unreasonably extends for segregation prisoners the protection granted for all prisoners' right of access to the courts in Bounds. Bounds equates adequate prison law libraries with adequate protection of prisoners' fundamental right of access to the courts. That case does not expressly impose any limits on prison officials' right to restrict physical access to prison law libraries for security reasons. Bounds itself also does not require direct physical access to prison law libraries for protection of prisoners' right of access. In fact, Bounds permits prison officials to be creative in their efforts to assure prisoners of meaningful access to the courts. 430 U.S. at 830.

A paging system that allows segregation prisoners to order for use in their cells legal materials from a list of the library's contents is one creative effort to assure the right of access to the

courts for segregation prisoners too dangerous to be allowed physical access to a library. The right of access to the courts should not demand that segregation prisoners, who have abundant time to contemplate and pursue legal actions and paging access to legal materials in a prison law library, be provided, in addition, with legal assistance from persons trained in the law.

Although the Fourth and Fifth Circuits apparently agree with the Ninth Circuit, Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979), and Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986), the Ninth Circuit's decision conflicts in principle with the decision of the Seventh Circuit in Arsberry v. Sielaff, 586 F.2d 37 (7th Cir. 1978). There, the Seventh Circuit held that segregation prisoners in Illinois prisons denied visits to prison law libraries were only entitled to some opportunity to

exercise their right of access to the courts and that their opportunity to request materials from a law library was constitutionally adequate protection of that right. Id. at 39, 43, 44.

More recently, in a case brought by a prisoner in the Control Unit of the United States Penitentiary at Marion, Illinois, the highest level maximum security prison in the federal system, the Seventh Circuit found that the prisoner's right of access to the courts was not unconstitutionally burdened by a process that provided him access to a small library in the Control Unit containing only legal reference materials, but that denied him physical access to the main prison law library. Campbell v. Miller, 787 F.2d 217, 225-28 (7th Cir. 1986). In Campbell, the federal penitentiary had no established program for providing prisoners in the Control Unit with legal assistance. Id. at 225.

Campbell suggests that a refusal to

provide high security inmates with direct access to a law library does not itself require the establishment of a legal assistance program for those inmates. In fact, Campbell supports the proposition that providing prisoners with limited access to reference material makes an otherwise exact-cite paging system constitutionally adequate. Caldwell v. Miller, 790 F.2d 589, 606 (7th Cir. 1986). For this reason, this Seventh Circuit decision also conflicts in principle with the Ninth Circuit's ruling that a paging system absent some form of legal assistance is unconstitutional.

The Eleventh Circuit also disagrees in principle with the Ninth Circuit's decision that a plan to ensure access to the courts for segregation prisoners must include legal assistance. In Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985), the court reversed and remanded a district court's ruling that any constitutionally acceptable

plan for ensuring Florida prisoners access to the courts had to include a provision for the assistance of counsel in some form. Id. at 1434-38. The plan found inadequate by the district court in Hooks apparently did not provide all inmates, especially those in administrative confinement, with physical access to a law library. Id. at 1435. Despite this, the Eleventh Circuit remanded the matter for, presumably, consideration of law library plans without physical access for all inmates and without legal assistance.

As decisions by the Seventh and Eleventh Circuits indicate, the Ninth Circuit's decision extends the right of meaningful access to the courts beyond the limits set forth in Bounds. In effect, its decision rewards the most dangerous and violent prisoners. The Ninth Circuit's decision means that in California prison officials no longer have the two choices presented them by Bounds. For if the Ninth

Circuit's decision stands, California prison officials will always be required to provide some prisoners with legal assistance despite the fact that its state prisons contain law libraries and inmates have effective access to those materials.

Prison officials must know the limits of prisoners' right of meaningful access to the courts for all prisoners in their custody, including those housed in the lowest and the highest security facilities. For state prison officials to make the choice offered them in Bounds, they must know what limits they may constitutionally impose upon physical access to prison law libraries. For this reason, and because of the conflict in principle between the Ninth, Fourth and Fifth, and the Seventh and Eleventh Circuits, it is imperative that this Court resolve this important issue of law. Only this Court can guide state prison officials in the decision whether to commit state resources to prison

law libraries or programs for legal assistance from persons trained in the law to satisfy all prisoners' right of access to the courts.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

DATED: March 27, 1987

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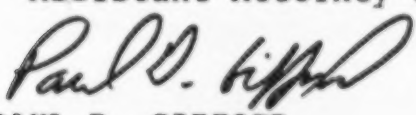

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Ninth Circuit Opinion filed September 30, 1986	1
United States District Court Findings of Fact and Conclusions of Law filed October 18, 1984	137
Order of Reference filed October 18, 1984	267
Judgment of Permanent Injunction filed October 18, 1984	277
Ninth Circuit Order Denying Rehearing filed December 31, 1986	300
Statutes	
28 U.S.C. § 2241	301
28 U.S.C. § 2254	303
42 U.S.C. § 1983	309

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9-30-86

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOUSSAINT, et al.,	)	C.A. Nos. 84-2833
	)	85-1507
	)	85-1878
Plaintiffs/ Appellees/	)	85-2526
Cross-	)	D.C. No.
Appellants,	)	CV 73-1422 SAW
	)	
vs.	)	OPINION
	)	
DANIEL McCARTHY, et al.,	)	
	)	
Defendants/ Appellants/ Cross-	)	
Appellees.	)	

On Appeal From the United States
District Court for the Northern District
of California
Stanley A. Weigel
Senior District Judge, Presiding
Argued and Submitted December 13, 1985
San Francisco, California

Before: WRIGHT, KENNEDY and BEEZER,
Circuit Judges

BEEZER, Circuit Judge:

Both parties appeal from the district court's order granting permanent injunctive relief against California prison officials. Although this appeal presents a variety of

discrete issues, the case presents this general issue: Does the protection afforded by the United States Constitution require that San Quentin and Folsom prison officials remain subject to controls imposed by the district court or should prison control be returned to California prison officials? We conclude that, in general, the district court assumed too much control over the day to day affairs of the prisons. Therefore, constitutional restraints require modification of the district court's decree.

I

BACKGROUND

This class action was commenced on behalf of prisoners committed to administrative segregation in four California prisons: San Quentin, Folsom, Deuel Vocational Institute at Tracy, and the Correctional Training Facility at Soledad. The defendants are the Director of the California Department of Corrections

and the wardens of the prisons involved. We address orders pertaining to San Quentin and Folsom.

The complaint was filed in 1973. In the first phase of the proceedings, a three-judge district court held that the state's practice of removing prisoners from the general population and placing them in maximum security segregation units violated the prisoners' fourteenth amendment right to due process of law. See Wright v. Enomoto, 462 F.Supp. 397 (N.D. Cal. 1976) (hereinafter referred to as "Wright I"). In Wright I, the defendants were ordered to employ a variety of procedures before segregating prisoners for administrative reasons. See id. at 404-05. The Supreme Court summarily affirmed the district court. Enomoto v. Wright, 434 U.S. 1052 (1978).

In the next phase of the litigation, the district court issued an unpublished comprehensive preliminary injunction

governing the conditions of confinement in the segregation units of the four prisons. We reversed the district court and vacated the injunction on the grounds that the district court applied the incorrect legal standard in assessing the plaintiffs' eighth amendment claims. See Wright v. Rushen, 642 F.2d 1129 (9th Cir. 1981).

On remand, the district reevaluated the conditions of confinement under the standard prescribed by Wright v. Rushen and issued a detailed preliminary injunction governing conditions of confinement and procedures for placement and retention in administrative segregation. See Toussaint v. Rushen, 553 F.Supp. 1365 (N.D. Cal. 1983). Although we affirmed the district court for the most part, we vacated a portion of the order which was not supported by the record. Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984). We also directed the district court to reconsider its conclusions regarding the

continuing propriety of procedural requirements in light of the Supreme Court's decision in Hewitt v. Helms, 459 U.S. 460 (1983). See Toussaint v. Yockey, 722 F.2d at 1494 n.6.

In the present phase of this case, the district court entered an injunction, which we refer to as the Permanent Injunction, governing conditions of confinement and segregation procedures at San Quentin and Folsom. Toussaint v. McCarthy, 597 F.Supp. 1388 (N.D. Cal. 1984). The court appointed a special master, known as the Monitor, to assist in the implementation of the Permanent Injunction and to advise the court regarding the need for further modifications of the Injunction. Id. at 1420-22. Pursuant to the order of reference, the Monitor ordered the release of a number of prisoners from administrative segregation.

Defendants now challenge various aspects of the Permanent Injunction and the

district court's affirmance of the Monitor's order to release a number of prisoners from administrative segregation. Defendants urge us to vacate parts III, IV(B), (C), and (D), and to modify Parts II(6), (10), and (15) of the Permanent Injunction. Defendants also complain about the district court's affirmance of the Monitor's decision to release prisoners Altamirano, Mendoza, Ramos, Castro, Gallegos, Hayes, Ferrel, Shryock, Pina, Elmore and Barela.

Plaintiffs cross-appeal the district court's refusal to extend the sweep of the injunction to cover additional prison conditions. Plaintiffs urge us to hold that enforced idleness in administrative segregation constitutes cruel and unusual punishment, that inmates legitimately barred from the prison law library be provided with adequate legal assistance, that health care services provided at Folsom do not meet minimum constitutional

standards, and that denial of contact visitation constitutes cruel and unusual punishment.

The opinions cited above offer additional discussion of the facts. We will discuss specific facts and arguments in turn.

II

SCOPE OF FEDERAL INJUNCTIVE RELIEF

In Ruiz v. Estelle, 679 F.2d 1115 (5th Cir. 1982), amended, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983), the Fifth Circuit reviewed a district court's order of injunctive relief against state prison officials. The Fifth Circuit described the role of the federal courts as follows:

> There is no iron curtain drawn between the Constitution and the prisons of this country. When the remedial powers of a federal court are invoked to protect the constitutional rights of inmates, the court may not take a hands-off approach.
>
> The duty to protect inmates' constitutional rights, however,

> does not confer the power to manage prisons, for which courts are ill-equipped, or the capacity to second-guess prison administrators. Federal courts should not, in the name of the Constitution, become enmeshed in the minutiae of prison operations. Our task is limited to enforcing constitutional standards and does not embrace superintending prison administration.

679 F.2d at 1126 (notes and quotations omitted). The court also stated that

> As a matter of respect for the state's role and for the allocation of functions in our federal system, as well as comity toward the state, the relief ordered by federal courts must be consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts. "[T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments" are applicable "where injunctive relief is sought . . . against those in charge of an executive branch of an agency of state" government. [Rizzo v. Goode, 423 U.S. 361, 380 (1976).] We should, therefore, fashion the least intrusive remedy that will still be effective. In shaping that remedy, we must also, as a matter of judicial administration,

> regard the essential nature of federal courts in an adversary system. Our remedial powers are inherently judicial, not administrative.

679 F.2d at 1145 (notes and quotations omitted).

We agree with the Fifth Circuit's description of the role of the federal courts. Injunctive relief against a state agency or official must be no broader than necessary to remedy the constitutional violation. See Milliken v. Bradley, 433 U.S. 267, 280 (1977) (remedy must be related to condition alleged to offend the constitution); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971) (task is to correct, by a balancing of the interests, the condition that offends the constitution; judicial powers may be exercised only on the basis of a constitutional violation); Hoptowit v. Spellman, 753 F.2d 779, 785 (9th Cir. 1985) (judge must order correction of specific violations and may require only that these

corrections bring the conditions above constitutional minima); Newman v. Alabama, 683 F.2d 1312, 1319 (5th Cir. 1982) (relief must be no broader than necessary to remedy the constitutional violation), cert. denied, 460 U.S. 1083 (1983); Hoptowit v. Ray, 682 F.2d 1237, 1246 (9th Cir. 1982) (function of court is limited to determining whether a constitutional violation has occurred and to fashioning a remedy that does no more and no less than correct that particular constitutional violation); Ruiz v. Estelle, 679 F.2d at 1144-46 (court must fashion the least intrusive remedy that will still be effective). A federal court may not enjoin a state official to follow state law. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-121 (1984). "The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." Meachum v. Fano, 427 U.S. 215, 229 (1976).

In fashioning a remedy for constitutional violations, a federal court must order effective relief. Smith v. Sullivan, 611 F.2d 1039, 1044 (5th Cir. 1980). Therefore, a federal court may order relief that the Constitution would not of its own force initially require if such relief is necessary to remedy a constitutional violation. See North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 15-16. A defendant's history of noncompliance with prior court orders is a relevant factor in determining the necessary scope of an effective remedy. Hutto v. Finney, 437 U.S. 678, 687 (1978); Hoptowit v. Ray, 682 F.2d at 1247; Ruiz v. Estelle, 679 F.2d at 1155-56.

However, our goal is to cure only constitutional violations. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16; Wright v. Rushen, 642 F.2d

1129, 1133-34 (9th Cir. 1981). The commission of a federal judge is not a "general assignment to go about doing good." Jett v. Castaneda, 578 F.2d 842, 845 (9th Cir. 1978). Accordingly, injunctive restraints that exceed constitutional minima must be narrowly tailored to prevent repetition of proved constitutional violations, and must not intrude unnecessarily on state functions. Ruiz v. Estelle, 679 F.2d at 1156. See generally Mishkin, Federal Courts at State Reformers, 35 Wash. & Lee L. Rev. 949 (1978).

III

SCOPE OF APPELLATE REVIEW

We are guided by three standards of review. We defer to the district court's findings of fact unless they are clearly erroneous. Anderson v. City of Bessemer, 105 S.Ct. 1504, 1510-11 (1985); Fed. R. Civ. P. 52(a). We review the district court's legal conclusions de novo. In re

McLinn, 739 F.2d 1395, 1398 (9th Cir. 1984) (en banc); United States v. McConney, 728 F.2d 1195, 1201 (9th Cir.) (en banc), cert. denied, 105 S.Ct. 101 (1984). We review the scope of injunctive relief for an abuse of discretion. Hutto v. Finney, 437 U.S. at 687-88; Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 15; Hoptowit v. Ray, 682 F.2d at 1245-46.

The term, "abuse of discretion," is often misunderstood and, perhaps, is an unfortunate label. See Pearson v. Dennison, 353 F.2d 24, 28 n.6 (9th Cir. 1965); R. Aldisert, The Judicial Process 759 (1976). Yet, the legacy of hundreds of cases renders "abuse of discretion" a term of art. See Friendly, Indiscretion About Discretion, 31 Emory L. J. 747, 762-63 (1982). We must recognize, however, that the term is a "verbal coat of many colors." Id. at 763 (quoting United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 39 (1952)

(Frankfurter, J., dissenting)). Judge Friendly notes that

> [t]here are half a dozen different definitions of "abuse of discretion," ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes.

Friendly, supra, at 763.1/ The Third Circuit has reasoned that

> [i]n our judicial system, a wide variety of decisions covering a broad range of subject matters, both procedural and substantive, is left to the discretion of the trial court. The justification for committing decisions to the discretion of the court are not

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1. We have recognized implicitly that the abuse of discretion standard varies with the decision being reviewed. See, e.g., C-Y Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983); see also LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 74-75 (2d Cir. 1985) (the term, "abuse of discretion," is capable of widely varying interpretations); Roland Machinery Co. v. Dresser Industries, 749 F.2d 380, 390 (7th Cir. 1984) ("abuse of discretion" describes a range of standards); Osuchukwu v. INS, 744 F.2d 1136, 1142 (5th Cir. 1984) ("abuse of discretion" is variable standard).

> uniform, and may vary with the specific type of decisions. Although the standard of review in such instances is generally framed as "abuse of discretion," in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance.

United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981) (footnote omitted). We agree with Criden. The extent of our deference to the district court is determined by several competing factors.

The remedy prescribed by the district court is something more than a mere permanent injunction2/ in which a United

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2. The term, "structural injunction," refers to the course of litigation and the series of orders that seek to "effectuate the reorganization of an ongoing social institution." O. Fiss, The Civil Rights Injunction 7 (1978). This form of injunctive relief is also known as an "institutional decree," an "administrative injunction," see Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L. J. 635, 635 and n.1 (1982), a "public law remedy," see Hinkle, Appellate Supervision of Remedies in Public Law Adjudication, 4 Fla. St. U. L. Rev. 411, 411-13 (1976); Chayes, The Role of the

States district court has enjoined state administrative officials in order to force a state agency to comply with constitutional standards. Such an injunction presents several relevant considerations, some of which militate towards great deference, and others which demand close and exacting scrutiny.

In protracted, complex litigation, the district court will acquire a close familiarity with the facts, parties, and nuances of the case, especially, as is the situation here, when the same judge has presided throughout. See Hinkle, Appellate Supervision of Remedies in Public Law Adjudication, 4 Fla. St. U. L. Rev. 411, 440 (1976).3/ The ability to hear

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Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1313 (1976), and as "complex enforcement," see Note, Complex Enforcement; Unconstitutional Prison Conditions, 94 Harv. L. Rev. 626, 626 n.1 (1981).

3. For instance, in the Arkansas prison litigation, Chief Judge Henley of the Eastern District of Arkansas continued

witnesses and directly view prison conditions places the district court judge in a superior position to consider alternative forms of relief. A district court's ability to fashion the most effective remedy may be hampered by unnecessary appellate interference.

However, the choice of remedy in structural litigation also involves several factors weighing in favor of close appellate review. First, the very familiarity that allows a district court to design an effective remedy may lead to excessive involvement and a breakdown of institutional perspective. See Fiss, The Social and Political Foundations of Adjudication, 6 Law & Human Behav. 121, 126

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to sit as a district judge by designation even after his appointment to the Eighth Circuit. See Finney v. Hutto, 410 F.Supp. 251 (E.D. Ark. 1976); O. Fiss & D. Rendleman, Injunctions 528-752 (2d ed. 1984) (case study of Arkansas prison litigation). See generally M. Harris & K. Spiller, After Decision: Implementation of Judicial Decrees in Correctional Settings (1977).

(1982). The court of appeals, which enjoys greater distance from the daily affairs of the litigation, is in a better position to assure detached neutrality. See Hinkle, supra, at 441.

Second, structural litigation frequently involves a close association of rights and remedies. See Note, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv. L. Rev. 626, 637-40 (1981). As we have noted above, the scope of federal injunctive relief against an agency of state government must be narrowly tailored to enforce constitutional requirements only. The adoption of a remedy in a particular case tends to establish the norm that defines the future standard of conduct.4/ The precedential

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4. We do not mean to imply that the adoption of a particular remedy in a given case requires the use of that remedy in another case. Indeed, we share Judge Sneed's view that courts should hesitate before "constitutionalizing" a remedy. See Grummett v. Rushen, 779 F.2d 491, 496-97 (9th Cir. 1985) (Sneed, J., concurring).

value of the adoption of a particular remedy raises questions of consistency and authoritativeness that can be resolved similarly to resolution of legal questions.

Third, and perhaps most importantly, a federal district court's exercise of discretion to enjoin state political bodies raises serious questions regarding the legitimacy of its authority. See Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L. J. 635, 642-44 (1982). Other that appellate review, few effective external controls check the district court's power.

Our weighing of the above factors leads us to the following standard of review. We will scrutinize the injunction closely to make sure that the remedy protects the plaintiffs' constitutional

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Nevertheless, we recognize the tendency to adopt remedies that have survived appellate review.

rights and does not require more of state officials than is necessary to assure their compliance with the constitution. Within these parameters, we will defer to the district court.

IV

THE EXISTENCE OF A LIBERTY INTEREST

The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law..." U.S. Const. amend. XIV, § 1; see Hewitt v. Helms, 459 U.S. at 466. Our threshold inquiry, therefore, is whether plaintiffs have a liberty interest in remaining in the general population. If plaintiffs do not possess a liberty interest, the constitution does not require prison officials to accord plaintiffs any procedural protections when deciding to segregate plaintiffs for administrative reasons. See Meachum v. Fano, 427 U.S. 215 (1976).

A liberty interest may arise from either of two sources: the due process clause itself or state law. Hewitt, 459 U.S. at 466. In Wright I, the district court held that California prisoners possessed liberty interests on both grounds. First, the court held that the due process clause itself prohibits arbitrary placement of prisoners in administrative segregation. The court reasoned that:

> When a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or for administrative reasons, there is a severe impairment of the residuum of liberty which he retains as a prisoner--an impairment which triggers the requirement for due process safeguards.

462 F.Supp. at 402. Second, the court held that section 3330 of Chapter 4, Article 6 of the Rules and Regulations of the Director of Corrections constituted a

state-created liberty interest.5/ The district court assumed that the Wright I decision was law of the case in these proceedings. 597 F.Supp. at 1416. Plaintiffs, similarly, contend that we are bound by Wright I, especially in light of the Supreme Court's summary affirmance.

A. Law of the Case

The doctrine of law of the case was "crafted with the course of ordinary litigation in mind. Such litigation

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5. At the time of the district court's decision in Wright I, 15 Cal. Admin. Code § 3330 provided:

> § 3330. General Policy. (a) Inmates must be segregated from others when it is reasonably believed that they are a menace to themselves and others or a threat to the security of the institution. Inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons. The reason for ordering segregated housing must be clearly documented by the official ordering the action at the time the action is taken.

462 F. Supp. at 403.

proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which after appeal, the binding finality of res judicata and collateral estoppel will attach." Arizona v. California, 460 U.S. 605, 618-19 (1983). Here, however, we review a structural injunction, which involves the ongoing application of changing law to changing circumstances.

Because permanent injunction relief controls future conduct, we are sensitive to the need for modification when circumstances change.

> A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative . . . . [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been

> doing has been turned through changing circumstances into an instrument of wrong.

United States v. Swift & Co., 286 U.S. 105, 114-15 (1932) (citations omitted). A change in the law may constitute a changing circumstance requiring the modification of an injunction. System Federation No. 91 v. Wright, 364 U.S. 642, 647-48 (1961). An intervening judicial opinion may require modification of an injunction. See Pasadena City Board of Education v. Spangler, 427 U.S. 424, 437-38 (1976) (when intervening clarification of constitutional law reduced obligations of state officials, district court abused its discretion by refusing to modify injunction accordingly). "When a change in the law authorizes what had previously been forbidden, it is an abuse of discretion for a court to refuse to modify an injunction founded on superseded law." American Horse Protection

Association v. Watt, 694 F.2d 1310, 1316 (D.C. Cir. 1982).6/

The Fourth Circuit's decision in Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981), is closely analogous to the instant case. In Nelson, the district court found "double celling" of inmates to be cruel and unusual punishment and ordered the prison administration to cease double celling. Id. at 421. The Fourth Circuit affirmed the district court's legal conclusions but remanded with instructions to fashion a decree that incorporated defendants' timetable for elimination of overcrowding. Id.; see Johnson v. Levine, 588 F.2d 1378 (4th Cir. 1978) (en banc). The district court modified its decree accordingly. See 659 F.2d at 421 (procedural background of

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6. See also Wright & Miller, Federal Practice & Procedure, § 2961, pp. 604-605 (1973) ("The three traditional reasons for ordering the modification or vacation of an injunction are (1) changes in operative facts, (2) changes in the relevant decisional law, and (3) changes in any applicable statutory law").

case). When defendants realized that they could not comply with prescribed timetables, they moved to modify the injunction. See id. at 423. In April of 1981, the district court denied the motion, found defendants in civil contempt, and imposed sanctions. See id. Defendants appealed. Id. On June 15, 1981, the Supreme Court decided Rhodes v. Chapman, 452 U.S. 337 (1981), which held, in short, that double celling does not violate the eighth amendment. The Fourth Circuit vacated the district court's order disapproving double celling. See 659 F.2d at 429. The Fourth Circuit also vacated the civil contempt citation and imposition of sanctions. Id. The Fourth Circuit reasoned that "[t]he question for purposes of decision here becomes, therefore, whether there have been, since the entry of the original Decree in these cases, changes in either operative facts or laws which cast a new light upon the facts or law as

originally ruled on in these cases." Id. at 424. The Nelson court found that Rhodes v. Chapman, and Bell v. Wolfish, 441 U.S. 520 (1979), mandated a different result from that reached by the court sitting en banc. 659 F.2d at 424-29.7/

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7. The standards for modification of an injunction should apply with equal, if not greater vigor, to direct appeals of an order of permanent injunctive relief. A modification under Fed. R. Civ. P. 60(b)(5) implicates the judicial ideals of repose and finality; a settled decision may be overturned. A direct appeal of an order of a permanent injunction, however, does not implicate repose or finality. Therefore, the procedural distinctions between a motion to modify an injunction and a direct appeal do not justify a more deferential approach in the case of direct appeals.

The Eighth Circuit's decision in Finney v. Arkansas Board of Correction, 505 F.2d 194 (8th Cir. 1974), supports this conclusion. In Finney, the district court granted injunctive relief regarding disciplinary procedures employed in the Arkansas prison system. Id. at 208. After the district court ordered relief, the Supreme Court decided Wolff v. McDonnell, 418 U.S. 539 (1974). The Eighth Circuit found that Wolff required a greater measure of relief and ordered the district court to modify its decree accordingly. 505 F.2d at 208. In Finney, the court of appeals applied intervening law in a direct appeal of a district court's order of injunctive relief. We find ourselves in a similar procedural position.

The Eleventh Circuit's opinion in Newman v. Graddick, 740 F.2d 1513 (11th Cir. 1984), similarly demonstrates that structural injunctive relief must follow the changing contours of constitutional law. In Newman, the district court ordered prison administrators to show cause why they should not be held in contempt for violating prior orders of the court concerning the Alabama state prison system. Id. at 1519. The district court also ordered that prisoners be released from confinement to relieve overcrowding. Id. The Eleventh Circuit vacated the order. Id. at 1522. The court held that "total compliance with a prior judgment or consent decree is not required before a court can entertain a request for modification." Id. at 1519-20. The Eleventh Circuit further held that the Supreme Court's intervening decision in Rhodes v. Chapman, along with changed factual circumstances, required

reconsideration of the propriety of injunctive relief. Id. at 1521.8/

Similarly, we cannot rely on Wright I. Neither premise upon which the Wright I court relied in finding a liberty interest still exists.

In Hewitt v. Helms, the Supreme Court held that the due process clause does not of its own force create a liberty interest in freedom from administrative segregation.

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8. In Graddick, the Eleventh Circuit considered the prospect that a motion to modify an injunction would be used as a dilatory tactic. The Eleventh Circuit reasoned that:

> The contention could be made that this decision would simply mean that the defendants could continually delay enforcement of a remedy for unconstitutionality by seeking modification every time enforcement is sought. This should not be a necessary result. The good faith of the defendants and the substantiality of the alleged improvements would always be a consideration before a hearing on modification would be required.

740 F.2d at 1521. We agree.

> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement.... Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.

Hewitt, 459 U.S. at 468. A liberty interest does not arise even when administrative segregation imposes "severe hardships," such as "denial of access to vocational, educational, recreational, and rehabilitative programs, restrictions on exercise, and confinement to [one's] cell for lengthy periods of time." See id. at 467 n.4; Clark v. Brewer, 776 F.2d 226, 228-30 (8th Cir. 1985) (due process clause itself does not create liberty interest notwithstanding the fact that conditions in "close management" are significantly more harsh than conditions in general population); see also McFarland v. Cassady, 779 F.2d 1426, 1427-28 (9th Cir. 1986) (Supreme Court in Hewitt held that due

process clause does not give inmate liberty interest in remaining in general population). Therefore, the Wright I court's holding that the due process clause creates a liberty interest in remaining in the general population is no longer correct.

The Wright I court's reliance on section 3330 is entitled to no deference. The version of section 3330 upon which the Wright I court relied has been repealed. See 15 Cal. Admin. Code § 3330 (former section 3330 was repealed on April 18, 1980).9/ A state-created liberty interest exists only as long as the statute or regulation creating it remains effective. If the state repeals the statute or eliminates the regulation, the liberty interest ceases to exist. Clark v. Brewer, 776 F.2d at 232. The Wright I liberty

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9. Because section 3330 has been repealed, we need not consider whether the language of that section would create a liberty interest under current standards.

interest determinations, therefore, neither guide nor control our consideration today.10/

Therefore, the doctrine of law of the case does not preclude review of the

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10. The plaintiffs argue that the Supreme Court in Hewitt reaffirmed its summary affirmance of Wright I. We disagree. In Hewitt, the Court merely noted that its summary affirmance of Wright I was the only case in which the Court had found that state statutes or regulations created a liberty interest in freedom from segregated housing within a prison. 459 U.S. at 469. The Court neither reaffirmed nor rejected its holding in Wright I; the reference to Wright I was entirely neutral.

Plaintiffs point out that the Court in Hewitt had the opportunity to reject its earlier affirmance of Wright I yet failed to do so. Plaintiffs argue that the Court's silence indicates approval of Wright I. This argument seriously misapprehends the nature of judicial opinions. It is a well recognized maxim that a court ought to avoid unnecessary decisions. Such decisions are dicta. The Court in Hewitt had no need to revisit Wright I. We refuse to attribute a hidden meaning to the Court's failure to engage in obiter dictum.

BEST AVA

continuing propriety of permanent injunctive relief.11/ The relevant

11. Even if the doctrine of law of the case applied in its usual manner, its strictures would not require blind obeisance to outdated legal principles. As the Supreme Court noted in Arizona v. California, supra:

> Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. Law of the case directs a court's discretion, it does not limit the tribunal's power.

460 U.S. at 618 (citations omitted). We have recognized that the doctrine is not to be applied woodenly. Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982), and that we will reconsider issues that have previously been decided "if such a course is warranted by 'considerations of substantial justice.'" United States v. Imperial Irrigation District, 559 F.2d 509, 520 (9th Cir. 1977) (quoting Lehrman v. Gulf Oil Corp., 500 F.2d 659, 662-63 (5th Cir. 1974), cert. denied, 420 U.S. 929 (1975)). We have also recognized that a prior decision should not be followed if "controlling authority has since made a contrary decision of the law applicable to such issues." Kimball v. Callahan, 590 F.2d 768, 771-72 (9th Cir.), cert. denied, 444 U.S. 826 (1979); see Handi Investment

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question becomes whether intervening changes in law or fact require different results.

B. Eighth Amendment Liberty Interest

Plaintiffs argue that the existence of eighth amendment violations in the administrative segregation units raises a due process liberty interest. We disagree.

Plaintiffs' sole authority for this proposition is a footnote from Justice

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Co. v. Mobil Oil Corp., 663 F.2d 391, 392-93 (9th Cir. 1981) (examining intervening case law to determine whether contrary result was proper); see also Amen v. City of Dearborn, 718 F.2d 789, 794 (6th Cir. 1983) (doctrine of law of the case "must yield to an intervening change of controlling law between the date of the first ruling and the retrial"); In re Multi-Piece Rim Products Liability Litigation, 653 F.2d 671, 678 (D.C. Cir. 1981) (decision may be reexamined in light of changes in governing law); EEOC v. International Longshoreman's Ass'n, 623 F.2d 1054, 1058 (5th Cir. 1980) (law of the case does not apply when controlling authority has since made a contrary decision of law inapplicable), cert. denied, 451 U.S. 917 (1981); White v. Murtha, 377 F.2d 428, 431-32 (5th Cir. 1967) (intervening controlling decision constitutes exception to doctrine of the law of the case), cited with approval in Arizona v. California, 460 U.S. at 618 n.8.

Stevens' dissenting opinion in Hewitt v. Helm. We find this a curious use of authority. Not only is the sole authority a footnote from a dissenting opinion, but the footnote does not support plaintiffs' position. Justice Stevens indicated that if such eighth amendment violations existed, "the Constitution would impose substantive, rather than procedural limits on transfers into segregated status." 459 U.S. at 481 n.4 (emphasis added).

Some fundamental considerations support Justice Stevens' conclusion. The state has no right to subject a prisoner to cruel and unusual punishment. The eighth amendment is not a "maybe" or a "sometimes" proposition. If conditions violate the eighth amendment, all prisoners have the right to be free of such conditions. The right does not vary depending on the threat that the individual prisoner presents to institutional security. No amount of

process can justify subjecting a prisoner to cruel and unusual punishment.

Moreover, acceptance of such an argument would create an unworkable standard. The assumption implicit in plaintiffs' argument is that eighth amendment violations exist in the segregation unit but do not exist in the general population. If both locations were infected with eighth amendment violations, process would be a meaningless gesture; it would make no sense to interpose a constitutional impediment to transfer from one place to another when the conditions in both locations are constitutionally impermissible.12/

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12. The conditions at San Quentin perfectly illustrate the infirmities of plaintiffs' argument. While we focus on the conditions in administrative segregation, state-court litigation is currently addressing the problems in San Quentin's general population. See Wilson v. Deukmejian, No. 103454 (Sup. Ct. Marin County, August 5, 1983) (Tentative Decision and Proposed Statement of Decision, Savitt, J.). Although we hesitate to venture into areas beyond the scope of this case, we

Assuming arguendo that the conditions in the general population lacked significant eighth amendment violations, we would have to determine what quantum of violation in administrative segregation would be sufficient to create an eighth amendment liberty interest. Wright v. Rushen, 642 F.2d at 1133-35, counsels that we consider separately each condition that allegedly contributes to the violation of plaintiffs' eighth amendment rights; a variety of discrete conditions exist in the segregation units. If we were to find that the defendants cured one of the conditions, would the eighth amendment liberty interest evaporate? Or if we were to find that a particular condition in the general population violated the eighth amendment, would the liberty interest vanish? Or

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cannot ignore reality. Judge Savitt's proposed decision paints as bleak a picture of the conditions in San Quentin's general population as does Judge Weigel's description of the segregation units.

perhaps plaintiffs would have us hold that a prisoner has an interest in remaining with his own eighth amendment violation and not being subjected to another in its place. Plaintiffs' approach would require a comprehensive determination regarding the conditions throughout the prison, if not the entire state prison system, to determine whether the eighth amendment created a due process liberty interest. We decline to require such an ambitious task in the name of such a dubious proposition.

The presence of eighth amendment violations in the segregation units, therefore, does not create a liberty interest. We will not parlay one constitutional right into another.

C. State-Created Liberty Interest

Several cases decided after the Supreme Court affirmed the district court's decision in Wright I illuminate our perspective on state-created liberty interests. Before we will recognize a

constitutionally protected liberty interest, state law must direct that a given action will be taken or avoided only on the existence or nonexistence of specified substantive predicates. See Olim v. Wakinekona, 461 U.S. 238, 249 (1983); Hewitt v. Helms, 459 U.S. 460, 470-72 (1983); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 11-12 (1979); Meachum v. Fano, 427 U.S. 215, 226-27 (1976); Allen v. Board of Pardons, 792 F.2d 1404 (1986); Roberts v. Spalding, 783 F.2d 867, 870 (9th Cir. 1986); McFarland v. Cassady, 779 F.2d 1426, 1428 (9th Cir. 1986); Rizzo v. Dawson, 778 F.2d 527, 530 (9th Cir. 1985); Baumann v. Arizona Department of Corrections, 754 F.2d 841, 844 (9th Cir. 1985).

The adoption of guidelines to structure the exercise of discretion does not necessarily create a liberty interest. Roberts v. Spalding, 783 F.2d at 870; Baumann v. Arizona Department of

Corrections, 754 F.2d at 844. As the Supreme Court has stated,

> The creation of procedural guidelines to channel the decision-making of prison officials is, in the view of many experts in the field, a salutory development. It would be ironic to hold that when a state embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal court, while states that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause. The adoption of such procedural guidelines, without more, suggests that it is these restrictions alone, and not those federal courts might also impose under the Fourteenth Amendment, that the state chose to require.

Hewitt v. Helms, 459 U.S. at 471.

1) The California Statutory Sentence Credit Scheme

The district court held that California Penal Code sections 2931 through 293313/ create a liberty interest in sentence reducing credits. 597 F.Supp. at 1416-17.

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13. See Appendix.

In a nutshell, sections 2931 and 2933 create a two-tiered scheme:

> Penal Code section 2933 provides that a state prison inmate may receive six months of worktime credit for every six months of full-time performance in a credit qualifying work, training or education program established by the Director of Corrections. Prisoners willing to participate in a full-time credit qualifying assignment, but who either are not assigned to such a program, or are assigned for less than full time, are to earn credits under the formula provided for by Penal Code section 2931, which is a four-month combined work and good behavior credit for each eight months served.

People v. Vallardes, 162 Cal.App.3d 312, 320, 208 Cal. Rptr. 604, 608 (1984).

Examination of section 2933 leads to the conclusion that prisoners have no right to earn the one-for-one worktime credits provided by that section. Section 2933 provides that "[w]orktime credit is a privilege, not a right." Cal. Penal Code § 2933(b). Section 2933 expressly contemplates that not all prisoners will be assigned to a credit qualifying program.

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See Cal. Penal Code § 2933(a) (". . . every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to full-time assignment or is assigned to a program for less than full time, shall receive no less credit than is provided under section 2931"). Although the California legislature intended the worktime sentence reducing scheme to instill a work ethic, see People v. Vallardes, 162 Cal.App.3d at 321, 208 Cal. Rptr. at 609, it did not create an absolute right to participate in work programs; the legislature created only a "reasonable opportunity." See Cal. Penal Code § 2933(b).

Moreover, a prisoner's "reasonable opportunity to participate" must be "consistent with institutional security and available resources." See Cal. Penal Code § 2933(b). Section 2933 delegates broad authority to the Director of Corrections to allocate worktime resources between various

categories of prisoners. See, e.g., In re Barnes, 176 Cal.App.3d 235, 221 Cal. Rptr. 415, 416-17 (1985) (Department of Corrections has established priority list; segregation unit prisoners are at bottom of list). Prisoners are not entitled automatically to participate in worktime credit programs. People v. Rosaia, 157 Cal.App.3d 832, 848, 203 Cal. Rptr. 856, 867 (1984). There is no guarantee that work programs will be available. People v. Caruso, 161 Cal.App.3d 13, 16 n.5, 207 Cal. Rptr. 221, 224 n.5 (1984). In sum, section 2933 merely creates a possibility of early release; it does not create a constitutionally protected liberty interest. See Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 8-11 (1979). Therefore, we conclude that section 2933 does not create a liberty interest in one-for-one worktime credits.

This conclusion, however, does not address the question of whether section 2933 creates a liberty interest in the one-for-two goodtime credits provided by section 2931. Section 2931 applies by its own terms to prisoners who are incarcerated for crimes committed prior to January 1, 1983 and who have not waived the right to receive credits under section 2931. Cal. Penal Code §§ 2931(d), 2934; see In re Ramirez, 39 Cal.3d 931, 933, 705 P.2d 897, 899, 218 Cal. Rptr. 324, 325-26 (1985), cert. denied, 106 S.Ct. 2266 (1986). More importantly for our purposes, section 2933 establishes that prisoners who are willing to participate in the worktime credit scheme but who are denied the opportunity to do so through no fault of their own "shall receive no less credit than is provided under Section 2931." Cal. Penal Code § 2933(a).

Section 2931 provides that a prisoner's sentence may be reduced by four

months for every eight months that the prisoner serves. Three of the four months accrue automatically if the prisoner commits no illegal acts or serious disciplinary infractions. Cal. Penal Code § 2931(b). One of the four months is based solely on participation in "work, educational, vocational, therapeutic or other prison activities." Cal. Penal Code § 2931(c). In practice, this one month credit is granted unless a prisoner refuses to accept work when offered. People v. Austin, 30 Cal.3d 155, 161-62, 636 P.2d 1, 5, 178 Cal. Rptr. 312, 316 (1981); 15 Cal. Admin. Code § 3043; Cal. Penal Code §§ 2931(c), 2932(b); see also People v. Sage, 26 Cal.3d 498, 510 n.1, 611 P.2d 874, 880-81 n.1, 165 Cal. Rptr. 280, 286 n.1 (1980) (Bird, C.J., concurring and dissenting).

While section 2931 differs somewhat from the Nebraska statute at issue in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1

(1979), in all material respects it is identical. Section 2931 contains the "shall/unless" formula that we find dispositive. See Baumann v. Arizona Department of Corrections, 754 F.2d 841, 844 (9th Cir. 1985). Therefore, we conclude that section 2931 creates a constitutionally protected liberty interest.

The conclusion that section 2931 creates a liberty interest, however, does not assist plaintiffs in this case. Since the defendants generally grant the credit to segregated prisoners, administrative segregation does not implicate the liberty interest arising from sections 2931 and 2933. The existence of a liberty interest, therefore, is irrelevant and cannot support the district court's holdings.14/

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14. The district court found that credits due under sections 2931 and 2933 are not invariably afforded. To the extent that the defendants may from time to time deny the credits due under sections 2931 and 2933, without affording a prisoner due

2) California Decisional Law

The plaintiffs argue that "by virtue of its appellate court decisions applying its constitution, California has created a "substantial liberty interest in not being placed in lockup by arbitrary procedures." Plaintiffs primarily rely on Conti v. Dyer, 593 F.Supp. 696 (N.D. Cal. 1984).

In Conti, the district court held that California state-court decisions created a liberty interest cognizable under the federal Constitution. Id. at 700-02. The Conti court found that California decisional law created a federal liberty interest notwithstanding the fact that the California courts expressly reject federal due process analysis and recognize a liberty interest in freedom from all arbitrary state action. Id. at 701; see People v. Ramirez, 25 Cal.3d 260, 268, 599

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process of law, that prisoner may obtain habeas corpus relief. See Preiser v. Rodriguez, 411 U.S. 475, 500 (1973).

P.2d 622, 627, 158 Cal. Rptr. 316, 320 (1979) ("when an individual is subjected to the deprivatory governmental action he always has a due process liberty interest both in fair and unprejudiced decision making and in being treated with respect and dignity."); see also Inmates of Sybil Brand Institute for Women v. County of Los Angeles, 130 Cal.App.3d 89, 108, 181 Cal. Rptr. 599, 609 (1982).

The district court's decision in Conti is not persuasive for several reasons. First, the court failed to acknowledge that the due process clause of the fourteenth amendment and the due process clause of the California constitution seek to protect qualitatively different interests. Under the fourteenth amendment, when the state deprives a person of liberty, it must provide that person with procedural protection. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Unless a liberty interest is implicated, arbitrary state action does

not violate the fourteenth amendment. Hewitt, 459 U.S. at 466-69. The due process clause of the fourteenth amendment focuses in relevant part on protecting liberty. The due process clause of the California constitution also seeks to protect liberty. But in addition, the due process clause of the California constitution seeks to promote accuracy and reasonable predictability in all government decision making when individuals are subject to any deprivatory action. People v. Ramirez, 158 Cal. Rptr. at 320. The California constitution does not impose the threshold requirement that a liberty interest exist. Id.

Even though the distinction between the two approaches will be academic in some instances, the distinction is critical in prisoners' rights cases. Under federal due process analysis, a legally incarcerated prisoner is stripped of all but the most incremental interest in liberty. Hewitt,

459 U.S. at 467; Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979). The federal perspective instructs that arbitrary decision making cannot deprive a person of that which has already been taken. Greenholtz, 442 U.S. at 8-11. The threshold inquiry, therefore, is whether the state has given back to the prisoner some liberty interest that previously the state had taken away. Stated alternatively, we must determine to what extent the state has deprived a criminal defendant of liberty in the first place.

For federal purposes, the extent and nature of the prisoner's remaining or re-created liberty is determined by looking for the substantive conditions or predicates that must exist before the state can again take the liberty away. Baumann v. Arizona Department of Corrections, 754

F.2d 841, 843-45 (9th Cir. 1985).15/ The quantity of procedural protections that a state may offer prisoners is not dispositive in determining the existence of a federal liberty interest. Greenholtz, 442 U.S. at 7. As the Court in Olim v. Wakinekona stated,

> "[a] liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality." [Shango v. Jurich, 681 F.2d 1091, 1100-01 (7th Cir. 1981).] Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.

461 U.S. at 250 (footnote omitted).

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15. The difference between substantive and procedural predicates to denial of liberty can be illustrated as follows. A person cannot be imprisoned unless he is tried. The trial is the procedural predicate to imprisonment. But merely affording a person a trial does not entitle the state to imprison a person; the state must prove the person's guilt. Guilt is the substantive predicate to imprisonment. The procedural predicate merely assists in determining the existence of the substantive predicate.

In contrast, the California due process clause requires process notwithstanding the absence of substantive predicates or conditions. People v. Ramirez, 158 Cal. Rptr. at 320. The state's provision of additional protection is entirely permissible. But the fact that the state courts call this additional protection a liberty interest does not make it so for the purposes of the federal constitution. Although a state court's determination of state law binds the federal courts, interpretation of the federal constitution cannot be circumscribed by state definitions. The California cases requiring heightened procedural protection, therefore, do not create a federally cognizable liberty interest.

3) California Prison Regulations

The plaintiffs argue that sections 3335 and 3336 of Title 15 of the California Administrative Code create a liberty

interest. These sections govern the placement and retention of prisoners in administrative segregation.

Our hesitance to construe a statute or regulation as creating a liberty interest is especially great when the statute or regulation governs the day-to-day administration of a prison. Again, Hewitt instructs that

> The deprivations imposed in the course of daily operations of an institution are likely to be minor when compared to the release from custody at issue in parole decisions and good-time credits. Moreover, the safe and efficient operation of a prison on a day-to-day basis has traditionally been entrusted to the expertise of prison officials . . . . These facts suggest that regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to "liberty," different from statutes and regulations in other areas.

Hewitt v. Helms, 459 U.S. at 470 (citations omitted). Accordingly, we have noted in the context of inter-institutional

transfers that "[u]nless there is some guarantee that transfer will not be effected except for misbehavior or some other specified reason, due process protections cannot apply." Rizzo v. Dawson, 778 F.2d at 530 (emphasis added).

We are convinced that sections 3335 and 3336, standing alone, do not create a liberty interest. However, when read in conjunction with section 3339 of the California Administrative Code, sections 3335 and 3336 withstand our exacting scrutiny; they create a constitutionally protected liberty interest.

Section 3335[16]/ specifies those circumstances requiring the immediate removal of an inmate from the general population. Nothing in section 3335 purports to limit the Department of Correction's authority to segregate inmates to the circumstances enumerated in that

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16. See Appendix.

section. The only mandatory language in section 3335 runs to the benefit of prisoners in the general population; they have some expectation that their dangerous neighbors will be removed to administrative segregation. Nothing in section 3335 suggests that a prisoner shall be allowed to remain in the general population absent the specified circumstances.

Section 3336[17]/ contains mandatory language running to the benefit of the segregated prisoner. Specifically, section 3336 requires that a sufficiently senior officer make the segregation decision, that the decision be documented, that the prisoner receive assistance, if needed, in presenting his case, and that the prisoner be informed of the reason for his segregation. Sections 3335 and 3336 standing alone, therefore, constitute a procedural guideline that "channel[s] the

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17. See Appendix.

decision-making of prison officials." See Hewitt, 459 U.S. at 471. Such procedural requirements, even if mandatory, do not raise a constitutionally cognizable liberty interest. Olim v. Wakinekona, 461 U.S. at 250.

However, section 3339(a) provides that "[r]elease from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation." 15 Cal. Admin. Code § 3339(a) (emphasis added). Section 3339(a) indicates that absent justification, a prisoner may not be retained in administrative segregation. The use of the word, shall, constitutes the mandatory language needed to create a liberty interest. See Hewitt, 459 U.S. at 471-72.

As the Supreme Court reasoned in Hewitt, the word "shall" alone is not sufficient. Rather, the liberty interest

is created when the word "shall" is used to mandate certain procedures "in connection with requiring specific substantive predicates for action." 459 U.S. at 472 (emphasis added). Those substantive predicates are contained in section 3335, and include standards for removal from the general inmate population where there is an immediate threat to the inmate's own safety or the safety of others, or when institutional security is endangered or the integrity of an investigation put in jeopardy. These standards are incorporated into section 3339 by that section's reference to "the circumstances and reasons for the inmate's initial placement in administrative segregation." We think, therefore, that the word "shall," read in conjunction with these specific substantive predicates, does create a liberty interest in the present case. We note, moreover, that the word "shall" is not used simply to mandate an investigation but to mandate

immediate release, absent procedures that determine that the substantive predicates for retaining the inmate in restrictive custody are demonstrated.

V

PROCEDURAL REQUIREMENTS GOVERNING PLACEMENT AND RETENTION IN ADMINISTRATIVE SEGREGATION

A. PLACEMENT

Our conclusion that the state has created a liberty interest in freedom from administrative segregation requires us to determine the quantum of process required by the fourteenth amendment. The determination of what process is due

> generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 12 (1979) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

The district court incorporated the procedural requirements mandated by the three-judge court in Wright I. See 597 F.Supp. at 1424. The Wright I order followed the procedures required for disciplinary confinement and denial of good time credits established in Wolff v. McDonnell, 418 U.S. 539 (1974). See Wright I, 462 F.Supp. at 403-05.18/ The district

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18. The Wolff procedures apply when a state, for disciplinary reasons, seeks to withdraw sentence credits that a prisoner already has acquired. See Wolff, 418 U.S. at 555-58. In Wolff, the Supreme Court held that a prisoner facing misconduct charges be accorded 24 hours' advance written notice of the charges against him; the right to call witnesses and present

court also established additional procedural requirements. The court ordered the defendants to release a prisoner no later than twelve months after placement in administrative segregation unless that prisoner is afforded all the hearing rights that attend the initial segregation decision. 597 F.Supp. at 1424. The court also required disclosure of the identity of any person providing information to prison authorities unless disclosure would endanger the safety of the source. Id. at 1424-25. Finally, the court prohibited segregation on the basis of undisclosed information. Id. at 1425.

In Hewitt v. Helms, 459 U.S. 460 (1983), the Supreme Court held that a lesser quantum of process is due when a

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documentary evidence in a manner consistent with institutional security; if illiterate, staff assistance in preparing a defense; an impartial tribunal; and a written statement explaining the basis of the tribunal's decision. See Wolff v. McDonnell, 418 U.S. at 563-72.

prisoner is placed in administrative segregation than is required by Wolff. The Court stated:

> We think an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him. An inmate must merely receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily, a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decisionmaker reviews the charges and then-available evidence against the prisoner, the Due Process Clause is satisfied.

459 U.S. at 476. The process mandated for administrative segregation under Hewitt, therefore, is substantially less than that required by Part III of the Permanent Injunction.

Plaintiffs nonetheless argue that Hewitt is distinguishable and a higher quantum of process is due in the instant case. Plaintiffs argue that they have a greater private interest than did the prisoners in Hewitt, that the presence of eighth amendment violations requires heightened process, and that the defendants' noncompliance with prior court orders requires a highly structured administrative proceeding.

We disagree. We recognize that the segregation units at issue in Hewitt were modern facilities and that the segregation units at San Quentin and Folsom, in contrast, are riddled with conditions that violate the plaintiffs' eighth amendment rights. Nevertheless, the Court in Hewitt proceeded on the premise that placement in administrative segregation would result in "severe hardships." 459 U.S. at 467 n.4. The hardships that a segregated prisoner in Hewitt would face included "denial of

access to vocational, educational, recreational, and rehabilitative programs, restrictions on exercise, and confinement to [one's] cell for lengthy periods of time." Id.; see id. at 479-80 n.1 (Stevens, J., dissenting). The distinction between the private interest at issue in Hewitt and that at issue here is not as extreme as the plaintiffs assert.

In addition, the state's interest in maintaining security in San Quentin and Folsom is at least as great, if not greater, than the state's interest shown in Hewitt. The inmate population at San Quentin and Folsom is composed of the most violent and anti-social offenders in the California prison system. See 597 F.Supp. at 1394, 1404-05. Given the disruptive propensities of the inmate population, we are especially sensitive to the Supreme Court's admonition that "[t]he safety of the institution's guards and inmates is perhaps the most fundamental responsibility

of the prison administration." Hewitt, 459 U.S. at 473.19/ The state's interest in maintaining safety and security weighs heavily in favor of avoiding prolonged and cumbersome administrative proceedings.

Finally, the value of Wolff-type procedures was minimal in the context of the decision to segregate a prisoner for administrative reasons. When determining whether the prisoner was guilty of misconduct, as was the case in Wolff, the inquiry is essentially factual. The prison administrator seeks to determine whether the prisoner committed the alleged offense. When deciding whether administrative segregation is needed, however, the

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19. Once again, we note that failure to remove dangerous prisoners from the general population may amount to a breach of the state's constitutional duties. See Wright v. Rushen, 642 F.2d at 1134 n.3 (citing Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977); see also Thomas v. Booker, 784 F.2d 299, 303 (8th Cir.) (en banc), cert. denied, 106 S.Ct. 1975 (1986).

administrator relies largely on subjective factors:

> In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners inter se, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if he himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on purely subjective evaluations and on predictions of future behavior; indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

Hewitt v. Helms, 459 U.S. at 474 (citations omitted); see also Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132-33 (1977); 15 Cal. Admin. Code §

3338(d), (e). A trial-like proceeding is unlikely to inform a prison administrator regarding such subjective considerations. See Clark v. Brewer, 776 F.2d at 235.

We conclude that when prison officials initially determine whether a prisoner is to be segregated for administrative reasons due process only requires the following procedures: Prison officials must hold an informal nonadversary hearing within a reasonable time after the prisoner is segregated.20/ The prison officials must inform the prisoner of the charges against the prisoner or their reasons for considering segregation. Prison officials must allow the prisoner to present his views.

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20. The district court's requirement that a hearing be held within 72 hours of segregation constitutes a "reasonable time." See Hewitt v. Helms, 459 U.S. at 476-78 nn. 8 & 9. We intimate no view as to whether due process would tolerate a more lengthy delay.

We specifically find that the due process clause does not require detailed written notice of charges, representation by counsel or counsel-substitute, an opportunity to present witnesses, or a written decision describing the reasons for placing the prisoner in administrative segregation. Cf. Wright I, 462 F.Supp. at 404-05; Toussaint III, 597 F.Supp. at 1424. We also find that due process does not require disclosure of the identity of any person providing information leading to the placement of a prisoner in administrative segregation. Cf. Toussaint III, 597 F.Supp. at 1424-25.

B. RETENTION

In Part III(B)(1) of the Permanent Injunction, the district court ordered defendants to release prisoners from administrative segregation on the prisoner's Minimum Eligible Release Date or at the expiration of twelve months of consecutive confinement, whichever is

shorter, unless the defendants afford the prisoner all the hearing rights that attend initial placement in segregation.

In Hewitt, the Supreme Court instructed that administrative segregation --

> may not be used as a pretext for indefinite commitment of an inmate. Prison officials must engage in some sort of periodic review of the confinement of such inmates. This review will not necessarily require that prison officials permit the submission of any additional evidence or statements. The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner -- which will have been ascertained when determining to confine the inmate to administrative segregation -- and on the official's general knowledge of prison conditions and tensions, which are singularly unsuited for "proof" in any highly structured manner. Likewise, the decision to continue confinement of an inmate pending investigation of misconduct charges depends upon circumstances that prison officials will be aware of-- most typically, the progress of the investigation.

Hewitt, 459 U.S. at 477 n. 9. The third circuit, similarly, has stated "the governmental interest involved in a good faith decision to subject a prisoner to administrative segregation may fluctuate with the passage of time and change of circumstances." Mims v. Shapp, 744 F.2d 946, 953 (3d Cir. 1984).

In Mims v. Shapp, the Third Circuit found that monthly review of a prisoner's status satisfied due process concerns. 744 F.2d at 952. Similarly, in Clark v. Brewer, the Eighth Circuit held that review every seven days for the first two months of segregation followed by regular review hearings every thirty days thereafter satisfied due process requirements. 776 F.2d at 234. Here, however, segregation may continue without review for as long as twelve months. We do not believe that annual review sufficiently protects plaintiffs' liberty interest. However, we intimate no view as to the frequency of

periodic review required. That is for the parties to recommend and the district court to decide in the first instance.

VI

SUBSTANTIVE CRITERIA GOVERNING PLACEMENT AND RETENTION IN ADMINISTRATIVE SEGREGATION

In Parts III(B) and IV(B) of the Permanent Injunction, the district court imposed criteria governing placement and retention of prisoners in administrative segregation. See 597 F.Supp. at 1424, 1426. The district court required that a prisoner not be placed or retained in segregation unless allowing the prisoner to remain in the general population would severely endanger the lives of prisoners, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct. Defendants argue that these criteria impose unwarranted limitations on prison management.

On their face, the substantive requirements merely restate the reasons justifying administrative segregation. See 15 Cal. Admin. Code § 3335(a). In Hewitt, the Supreme Court recognized that "[t]he safety of the institution's guards and inmates is perhaps the most fundamental responsibility of the prison administration." 459 U.S. at 473. The substantive requirements accommodate this concern. The Court in Hewitt also stated that administrative segregation of a prisoner "pending investigation of charges against him serves important institutional interests relating to the insulating of possible witnesses from coercion or harm." Id. The substantive criteria accommodate the prison administration's interests in this regard as well. Moreover, the substantive criteria apply only to placement or retention in administrative segregation. The criteria do not impinge on defendants' ability to hold disciplinary

hearings and to punish prisoners for misconduct. Since administrative segregation must not be a pretext for punitive isolation, Hewitt, 459 U.S. at 477 n.9, the substantive criteria assure that plaintiffs' due process rights are not meaningless gestures. The district court, therefore, did not abuse its discretion in fashioning these substantive criteria.

VII

THE INTERIM PERIOD REMEDIES

In Part IV of the Permanent Injunction, the district court established an additional layer of relief to apply during the "interim period." The court defined the interim period as that time between the date on which the Permanent Injunction issued and the date on which the Monitor21/ certifies that defendants are "in full compliance with the Permanent

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21. The Monitor is a special master, appointed pursuant to Fed. R. Civ. P. 53. See 597 F. Supp. at 1425.

Injunction and that conditions of confinement in segregation units at San Quentin and Folsom do not violate the Constitution." 597 F. Supp. at 1425.22/ The court ordered that any prisoner assigned to segregation could request release and, if the defendants denied the request, the prisoner could obtain review by the Monitor. The court empowered the Monitor to order the release of individual prisoners from administrative segregation. Id. at 1426.

A. Habeas Corpus Jurisdiction

The defendants argue that the district court lacks jurisdiction under 42 U.S.C. § 1983 to order prisoners released from

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22. Although Part IV of the Permanent Injunction speaks of "interim" relief, we question whether the district court can retain jurisdiction once the defendants meet the conditions specified in Part IV. See generally Riddick v. School Board of the City of Norfolk, 784 F.2d 521 (4th Cir. 1986). Of course, this litigation has not reached a point demanding resolution of this question.

administrative segregation.23/ Defendants contend that under Preiser v. Rodriquez, 411 U.S. 475 (1973), the writ of habeas corpus is the exclusive federal remedy available to a prisoner who seeks to challenge the fact of confinement, and that the district court's order evades the requirement that the prisoner exhaust state

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23. We note sua sponte that the district court's delegation to the Monitor of the power to order release raises serious constitutional questions. See, e.g., Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982); United States v. Raddatz, 447 U.S. 667 (1980); Fiss, The Social and Political Foundations of Adjudication, 6 Law & Human Behav. 121 (1982); Note, Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View, 88 Yale L. J. 1023 (1979). We have found no case in which such a broad delegation of power to a special master has withstood review. Nevertheless, the defendants do not object to the delegation of power to the Monitor; defendants contest the authority of the court itself to order the release of prisoners from administrative segregation. Therefore, we refrain from deciding the question. However, we do not wish our silence to be taken as a ratification of the district court's order.

remedies. Preiser does not support defendants' contentions.

In Preiser, state prisoners sued in federal district court under 42 U.S.C. § 1983 alleging that they were deprived of good-time credits improperly. 411 U.S. at 476. The prisoners sought injunctive relief to compel restoration of the credits. Id. The Supreme Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from the imprisonment, his sole federal remedy is a writ of habeas corpus." Id. at 500.24/

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24. The Court also stated in dictum that "when a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal." Id. at 499. One court has followed this reasoning and held that habeas corpus provided the exclusive remedy for obtaining an order compelling release from

In Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974), however, the Supreme Court held that Preiser only precludes restoration of credits under 42 U.S.C. § 1983. The Court stated "that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled." Id. at 555 (footnote omitted; emphasis added).

Here, the district court did not restore credits nor release any prisoner from prison. The court, in essence, authorized the Monitor to move individual prisoners from one location to another within the prison. We do not believe that such relief falls within the traditional

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administrative detention. Boudin v. Thomas, 732 F.2d 1107, 1111-12 (2d Cir. 1984).

core of habeas corpus. Consequently, the plaintiffs need not exhaust state remedies before seeking relief in federal court. The district court did not exceed its jurisdiction by authorizing the release of prisoners from administrative segregation.

B. Standard of Review Employed by the Monitor

Part IV(D) of the Permanent Injunction authorizes the Monitor to review records of defendants' placement and retention decisions, to accept additional evidence, and to order a prisoner's release "[i]f the Monitor concludes on the basis of all evidence submitted, that the prisoner was placed or retained in segregation in violation of any provision of [the] Permanent Injunction . . . ." 597 F. Supp. at 1416. Defendants argue that the district court abused its discretion by authorizing the Monitor to review defendants' placement and retention decisions de novo.

We have already determined that the district court properly imposed substantive standards to be used in deciding whether to segregate a prisoner or retain a prisoner in segregation. The question here is who should apply those standards and how much evidence is required in support of a segregation or retention decision.

Prison administrators, not courts, must run prisons:

> [A] prison's internal security is peculiarly a matter normally left to the discretion of prison administrators. In assessing the seriousness of a threat to institutional security, prison administrators necessarily draw on more than specific facts surrounding a particular incident; instead, they must consider the character of the inmates confined in the institution, recent and longstanding relations between prisoners and guards, prisoners inter se, and the like. In the volatile atmosphere of a prison, an inmate easily may constitute an unacceptable threat to the safety of other prisoners and guards even if ge himself has committed no misconduct; rumor, reputation, and even more imponderable factors may suffice to spark potentially disastrous

> incidents. The judgment of prison officials in this context, like that of those making parole decisions, turns largely on purely subjective evaluations and on predictions of future behavior; indeed, the administrators must predict not just one inmate's future actions, as in parole, but those of an entire institution.

Hewitt, 459 U.S. at 474 (citations omitted); see also Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132-33 (1977).

Courts must accord wide-ranging deference to prison administrators "in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979). "[W]here state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." Procunier v. Martinez, 416 U.S. 396, 405 (1974). We recognize, moreover, "that 'the

relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a state and a private citizen,' and that the 'internal problems of state prisons involve issues . . . peculiarly within state authority and expertise.'" Pell v. Procunier, 417 U.S. 817, 825-26 (1974) (quoting Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)). The need to restrict injunctive relief to enforcement of minimum constitutional rights is especially great when federal judicial relief threatens to usurp such highly discretionary state functions.

The Supreme Court's decision in Superintendent v. Hill, 105 S. Ct. 2768 (1985), indicates that the due process clause requires only the existence of "some evidence" in support of a prison administrator's segregation decision. Id. at 2770.

In Hill, the plaintiff, a prisoner, was charged with misconduct for assaulting another inmate. Id. At the disciplinary hearing, a prison guard testified that he heard a scuffle, found the victim bleeding from the mouth, and observed the plaintiff and two other inmates jogging away down an enclosed corridor. Id. No evidence was adduced concerning which of the three retreating inmates caused the victim's injuries. Id. The prison disciplinary board withdrew 100 days of plaintiff's good time credit and ordered that plaintiff be confined in isolation for 15 days. Id. The plaintiff challenged the prison administration's decision in state court, which granted summary judgment in plaintiff's favor. Id. The Massachusetts Supreme Court affirmed on the ground that the record failed to reflect any evidence that would support the disciplinary board's findings. Id. at 2771. The United States Supreme Court reversed. Id.

The Court held that "revocation of good time does not comport with minimum requirements of procedural due process unless the findings of the prison disciplinary board are supported by some evidence in the record." Id. at 2773 (citation omitted). The Court held that the evidence recited above was sufficient. Id. at 2775. The Court's reasoning merits recitation at length:

> Where a prisoner has a liberty interest in good time credits, the loss of such credits threatens his prospective freedom from confinement by extending the length of imprisonment. Thus the inmate has a strong interest in assuring that the loss of good time credits is not imposed arbitrarily. This interest, however, must be accommodated in the distinctive setting of a prison, where disciplinary proceedings "take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." Consequently, in identifying the safeguards required by due process, the Court has recognized the legitimate institutional needs of assuring the safety of inmates

and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation.

Requiring a modicum of evidence to support a decision to revoke good time credits will help to prevent arbitrary deprivations without threatening institutional interests imposing undue administrative burdens.

. . .

Because the written statement mandated by Wolff requires a disciplinary board to explain the evidence relied upon, recognizing that due process requires some evidentiary basis for a decision to revoke good time credits will not impose significant new burdens on proceedings within the prison. Nor does it imply that a disciplinary board's factual findings or decisions with respect to appropriate punishment are subject to second-guessing upon review.

We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if "there was some evidence from which the conclusion of the administrative tribunal could be deduced ...."

> Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact.

Id. at 2774 (quotations and citations omitted, emphasis added).

The Court's decisions in Hewitt and Hill lead to two conclusions: First, the exigencies of prison administration allow prison administrators to make segregation decisions on the basis of "some evidence," including the administrator's experience and awareness of general prison conditions;

second, a reviewing court may not reverse the administration's decision if "some evidence" supports the administration's decision.

Plaintiffs seek to distinguish Hill on the basis that "the issue before this Court is not what due process requires, but rather, whether the district court abused its discretion in formulating a remedy for proven violations of the Constitution (including Eighth Amendment Rights)." We reject this argument for reasons similar to those we gave in holding that eighth amendment violations do not create a liberty interest. See supra pages 20-22. A prisoner who presents a clear security risk enjoys exactly the same eighth amendment protection as does the most placid prisoner. The fact that justification exists for segregating a particular prisoner will not assuage his sufferings. Therefore, close scrutiny of prison officials' segregation decisions

will do little to protect plaintiffs' eighth amendment rights.25/

We also do not consider the defendants' history of noncompliance with prior orders to constitute a valid reason for this court to arrogate to itself the discretion imposed on the defendants. The earlier orders demanded much more of the defendants than the law now requires. Our purpose is not to punish defendants for their past failures, but to enforce compliance with current constitutional standards. We perceive no reason why the defendants would be unwilling to comply with the requirements we have established. But even if the defendants failed to comply, de novo review by the court or the Monitor would be unwarranted. The district court could assure itself that the

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25. Moreover, if Judge Savitt's conclusions regarding the conditions in the general population are correct, see supra note 12, interfering in segregation decisions, would be futile, at least as far as the San Quentin plaintiffs are concerned.

defendants were complying with the constitution simply by examining the record for "some evidence" in support of each challenged segregation decision. The district court abused its discretion by allowing the Monitor to substitute his discretion for that of the defendants.26/

VIII

THE WORK REQUIREMENT

In Part III(C) of the Permanent Injunction, the district court ordered that no prisoner assigned to administrative segregation be denied the opportunity to participate in work, education, or vocational training programs. 597 F. Supp. at 1425.

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26. We note that Part IV(D) of the Permanent Injunction appears to allow a segregated prisoner to obtain repeated review of his status. As we have discussed above, due process requires only reasonable periodic review. See Clark v. Brewer, 776 F.2d at 234. On remand, if the district court decides that review by the court or the Monitor is required, the court shall not require more frequent review than is necessary to protect plaintiffs' due process rights.

A. Due Process

Plaintiffs contend that Part III(C) is necessary to the enforcement of plaintiffs' due process rights. This is not true. Requiring prison officials to provide work programs is an inappropriate remedy. The due process clause seeks to prevent denial of life, liberty or property by arbitrary decision. Hewitt, 457 U.S. at 476; Greenholtz, 442 U.S. at 7. The due process clause requires procedure. See Mathews v. Eldridge, 424 U.S. at 335. The district court's order, however, does not relate to enforcement of procedural protections. The work requirement relates only to the conditions of confinement. To the extent Part III(C) merely constitutes an enforcement of state law, it violates the eleventh amendment. Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 97-121 (1984).

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B. Eighth Amendment

In Hoptowit v. Ray, 682 F.2d at 1254-55, 1258, we held that "[i]dleness and the lack of programs are not eighth amendment violations. The lack of these programs simply does not amount to the infliction of pain." The district court recognized this language as controlling. 597 F. Supp. at 1414. Plaintiffs,27/ nonetheless, urge us

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27. Plaintiffs failed to brief this issue in their opposition brief and opening brief on cross-appeal, but instead refer us to the briefs filed by amici, the Bar Association of San Francisco, the San Francisco Lawyers Committee on Urban Affairs, and the California Attorneys for Criminal Justice. Defendants object to consideration of this issue on the basis that an argument made on appeal by amici, but not by the parties, is not properly before the reviewing court. In each of the cases cited by defendants, the courts refused to consider issues not raised by the paries. See United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60 n.2 (1981); Bell v. Wolfish, 441 U.S. 520, 531 n.13 (1979); Knetsch v. United States, 364 U.S. 361, 370 (1970); Wiggins Bros., Inc. v. Department of Energy, 667 F.2d 77, 83 (Temp. Emer. Ct. App. 1981), cert. denied, 456 U.S. 905 (1982); National Comm'n on Egg Nutrition v. Federal Trade Comm'n, 570 F.2d 157, 160, n.3 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). In the instant case, however, plaintiffs raised

to reverse the district court's decision that enforced idleness is not a violation of the eighth amendment. Plaintiffs implicitly urge us to overrule Hoptowit v. Ray.

To arrive at the desired result, plaintiffs believe that two logical steps must be taken. First, plaintiffs urge us to clarify the language in our prior

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the issue but failed to brief it. Moreover, plaintiffs argue this issue in their reply brief on cross-appeal. The plaintiffs obtained leave of court to file their 75 page brief. The amici briefs add 39 pages of argument in support of plaintiffs' request on this issue. By incorporating amicis' arguments by reference, plaintiffs have circumvented the page limits set by the court.

Although we do not condone such practices generally, we recognize that this case presents a number of weighty constitutional issues. The defendants have had every opportunity to respond to the arguments of plaintiffs and amici and, in fact, have briefed this issue. Justice would not be served by ignoring the amicis' arguments. Therefore, we exercise our discretion to consider this issue.

To avoid confusion, henceforth we will refer to plaintiffs and amici solely as plaintiffs.

opinions regarding the proper framework for analyzing an alleged eighth amendment violation. Second, plaintiffs urge us to reject or limit our holding in Hoptowit v. Ray regarding idleness.

In Hoptowit v. Ray, we considered the eighth amendment analytical framework at length. See 682 F.2d at 1246-47. Our discussion leads to the undeniable conclusion that we follow the "related conditions" approach urged by plaintiffs. Plaintiffs object, however, to one statement in Hoptowit. In Hoptowit we stated, inter alia, that "[a] number of conditions, each of which satisfy Eighth Amendment requirements, cannot in combination amount to an Eighth Amendment violation." 682 F.2d at 1247. To the extent that this sentence creates uncertainty or ambiguity regarding the analytical framework employed in this circuit, such uncertainty or ambiguity may be rectified easily. We meant that a

number of unrelated conditions, each of which satisfy eighth amendment requirements, cannot in combination amount to an eighth amendment violation. See Wright v. Rushen, 642 F.2d at 1133.

Plaintiffs contend that Hoptowit v. Ray ignores related conditions by creating a per se rule that enforced idleness does not constitute cruel and unusual punishment. Plaintiffs argue that by applying Hoptowit's per se rule, the district court failed to consider related conditions that, when combined with enforced idleness, would create a cruel and inhuman situation.

Plaintiffs' arguments are unpersuasive for several reasons. First, related conditions are those conditions that combine to deprive a prisoner of a discrete basic human need. Hoptowit v. Ray, 682 F.2d at 1246. The discrete basic human needs that prison officials must satisfy include food, clothing, shelter,

sanitation, medical care, and personal safety. Id.; Wright v. Rushen, 642 F.2d at 1132-33. Enforced idleness, taken alone, simply does not deprive a prisoner of any of these basic needs. See Hoptowit v. Ray, 682 F.2d at 1254-55.28/

Second, plaintiffs do not identify any related conditions that would support a finding that enforced idleness created an

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28. Although methods of analysis differ, each circuit that has considered the issue has held that enforced idleness does not constitute cruel and unusual punishment. See Jackson v. Meachum, 699 F.2d 578, 581-85 (1st Cir. 1983) (cataloging decisions of other circuits); see also Madyun v. Thompson, 657 F.2d 868, 874 (7th Cir. 1981); Ramos v. Lamm, 639 F.2d 559, 566-67 (10th Cir. 1980), cert. denied 450 U.S. 1041 (1981); Bono v. Saxbe, 620 F.2d 609, 614-15 (7th Cir. 1980); Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), rev'd in part on other grounds sub num. Alabama v. Pugh, 438 U.S. 781 (1978); Sweet v. South Carolina Department of Corrections, 529 F.2d 854, 861 (4th Cir. 1975); Sostre v. McGinnis, 442 F.2d 178, 192-93 (2d Cir. 1971), cert. denied, 404 U.S. 1049 (1972). The expert opinions cited by plaintiffs are entitled to little weight in determining whether a particular condition constitutes cruel and unusual punishment. Rhodes v. Chapman, 452 U.S. 337, 348 n.13 (1981). We adhere to our holding in Hoptowit v. Ray.

eighth amendment violation in this case. Plaintiffs point to the violence and psychological pain that enforced idleness engenders. Related conditions, however, are not those that result from another condition, but those that in combination create a cruel and unusual punishment. See, e.g., Wright v. Rushen, 642 F.2d at 1134; Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979). In reality, plaintiffs urge us to hold as a matter of law that "lengthy enforced idleness does not comport with contemporary standards of decency, and that work, educational, and vocational programs are constitutionally mandated." Plaintiffs, therefore, implicitly ask us to overrule Hoptowit v. Ray and create a per se rule to the contrary.

Third, even if we held that enforced idleness in administrative segregation constitutes cruel and unusual punishment, it does not follow that mandating work programs is the appropriate remedy. An

injunction must be narrowly tailored to cure the constitutional violation and must not intrude on the functions of state officials unnecessarily. We would violate this principle by holding as a matter of law that provision of work programs is the necessary remedy for enforced idleness. See supra note 4; Grummett v. Rushen, 779 F.2d at 496-97 (Sneed, J., concurring).

Fourth, whether or not Hoptowit states a per se rule, the district court did not apply it as such. Plaintiffs distort the district court's factual findings and legal reasoning to create the impression that the district court failed to consider the effect of enforced idleness on the plaintiffs. The district court, however, considered several factors in concluding that idleness did not rise to an eighth amendment violation. The court stated that--

> the denial of programs to plaintiffs is not 'totally without penological

> justification.' At least in theory, each plaintiff has been selected for segregation on the basis of criteria indicating that he is in some way unfit or unsuited for intermingling with other inmates, whether because he has misbehaved, because he presents a threat to the safety of other inmates, or because he has requested isolation from other inmates for his own protection.

597 F. Supp. at 1414. The district court, therefore, did not blindly follow a per se approach.29/

The plaintiffs' argument largely depends on the assertion that enforced idleness engenders a high degree of violence. Plaintiffs attempt to draw a

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29. Regardless of the ambiguity in this circuit's description of the eighth amendment analytical framework, it is abundantly clear that the district court adopted and applied the related conditions approach throughout its opinion. See, e.g., 597 F. Supp. at 1408 (if all other conditions are satisfactory, segregating inmates in small cells is not eighth amendment violation); id. at 1409 (under prevailing conditions, double celling is cruel and inhuman); id., at 1411 (conditions of filth require that inmates be provided with hot running water or periodic showers).

close connection between enforced idleness and violence in the instant case by stating that "The District Court specifically found that '[l]ockup units at San Quentin and Folsom are counted among the most violence-racked correctional facilities in the United States .... In part, it may be due to the fact that lockup units have no programs.'" The district court's findings indicate that the connection between violence and enforced idleness in administrative segregation is substantially more attenuated than plaintiffs would have us believe. The district court stated in full:

> Lockup units at San Quentin and Folsom are counted among the most violence-racked correctional facilities in the United States. In part, this is due to the California Department of Corrections policy of concentrating the most violence-prone offenders in these two institutions. In part, it is caused by the horrendous physical conditions, including double-celling. In part, it is due to the crowding of both facilities beyond design capacity. In part,

> it may be due to the fact that lockup units have no programs. But in large measure, it originates in the violent propensities of segregated inmates themselves.

597 F. Supp. at 1404-05.

The plaintiffs' argument also depends on the assertion that enforced idleness inflicts psychological pain without penological justification. Again, plaintiffs ignore the actual findings and reasoning of the district court. The district court expressly found that "denial of programs is not totally without penological justification." 597 F. Supp. at 1414. Plaintiffs' argument that the district court failed to consider related conditions, therefore, is incorrect.

We vacate Part III(C) of the Permanent Injunction. The administration of state-created work programs is the province of prison officials, not of the district court.

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IX

ACCESS TO THE PRISON LAW LIBRARY

In Part II(15) of the Permanent Injunction, the district court ordered defendants to allow segregated prisoners access to the prison law library as reasonably necessary, absent documented security reasons. 597 F. Supp. at 1424. The court found that the "paging system"30/ in use at San Quentin and Folsom rendered effective legal research virtually impossible. Id. at 1403. However, the district court allowed the defendants to deny physical access to the libraries to those plaintiffs who are documented security risks. Id. at 1424. The court specified that any prisoner denied access to the libraries be permitted to order five

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30. A paging system allows a prisoner to request specific volumes. The significant features of such a system are that the prisoner must know in advance which volumes he will need to review and that the process of ordering and returning books drastically prolongs legal research.

books per week, which would be delivered to the prisoner's cell. Id.

In Bounds v. Smith, 430 U.S. 817 (1977), the Supreme Court held that prisoners have a constitutional right of access to the courts which in turn requires prison authorities to provide prisoners with adequate law libraries or adequate assistance from persons trained in the law. Id. at 828; see Lindquist v. Idaho State Board of Corrections, 776 F.2d 851, 855 (9th Cir. 1985). In Lindquist, we recognized that

> The existence of an adequate law library does not provide for meaningful access to the courts if the inmates are not allowed a reasonable amount of time to use the library. However, the Constitution does not guarantee a prisoner unlimited access to a law library. Prison officials of necessity must regulate the time, manner, and place in which library facilities are used. The fact that an inmate must wait for a turn to use the library does not necessarily mean that he has been denied meaningful access to the court.

Id. at 858 (citations omitted).

Defendants do not challenge the validity of the district court's factual findings. Defendants argue that the district court should have limited injunctive relief to remedying the deficiencies in the paging system. Plaintiffs argue that the district court did not abuse its discretion in ordering physical access absent compelling security needs. Plaintiffs also argue, however, that the district court abused its discretion by failing to require defendants to provide legal assistance to inmates barred from physical access.

The district court's order accommodates defendants' interests by allowing them to limit physical access to the law library. They need only permit reasonably necessary use. Moreover, even if a segregated inmate needs to use the law library, defendants may preclude physical access if such access would interfere with institutional security.

The defendants interpret the portion of the court's order allowing limited use of the paging system as an acknowledgement of the efficacy of the system. This interpretation is incorrect. The district court expressly found that the paging system significantly impairs effective legal research. 597 F. Supp. at 1403, 1413. Allowing a limited use of the paging system merely recognizes defendants' interest in institutional security.

Plaintiffs contend that even as "improved" by the district court, the paging system is constitutionally deficient. This argument has merit. In William v. Leeke, 584 F.2d 1336 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979), the Fourth Circuit held that allowing a prisoner physical access to a law library for 45 minutes a day, three days a week did not constitute a meaningful opportunity to conduct legal research. Id. at 1340. Presumably, a prisoner could examine more

than five books in that amount of time. The Williams court noted that

> Ordinarily, a prisoner should have direct access to a law library if the state chooses to provide a prison law library as its way of satisfying the mandate of Bounds. Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies that he might have. Legal research often requires browsing through various materials in search of inspiration; tentative theories may have to be abandoned in the course of research in the face of unfamiliar adverse precedent. New theories may occur as a result of a chance discovery of an obscure or forgotten case. Certainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer exploring his case. It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult.

Id. at 1339.

The Williams court permitted the state to use a paging system when the state did not rely solely on access to a law library to satisfy Bounds. In Williams, Virginia and South Carolina provided state-funded

legal counsel or trained legal assistants to prisoners contesting the legality or conditions of confinement. Id.

Plaintiffs in the instant case request research assistance for all prisoners denied physical access to the law libraries. The great weight of authority in the courts of appeals supports plaintiffs' request. See Nordgren v. Milliken, 762 F.2d 851, 853-55 (10th Cir. 1985) (state provided access to courts by providing legal assistance in drafting pleadings), cert. denied, 106 S. Ct. 593 (1986); Williams v. Wyrick, 747 F.2d 1231, 1232 (8th Cir. 1984) (state satisfied Bounds by providing two inmate paralegals and one runner to procure law books, copy materials and research legal questions for 23 death-row inmates; Corgain v. Miller, 708 F.2d 1241, 1247-50 (7th Cir. 1983) (where state actually provided legal assistance, access to legal materials could be restricted); Holt v. Pitts, 702 F.2d

639, 640-41 (6th Cir. 1983) (state may deny physical access to law library to ensure security when prisoner has access to person trained in law); Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981) (state must show that alternatives to access to prison library satisfy Bounds); Williams v. Leeke, 584 F.2d at 1339. Cf. Arsberry v. Sielaff, 586 F.2d 37, 44 (7th Cir. 1978) ("as long as adequate alternatives are available in light of legitimate penological objectives, a limitation on a prisoner's constitutional rights will not be deemed impermissible"). Moreover, plaintiffs' suggested remedy would not be overly intrusive. The defendants would only be required to provide legal assistance to those prisoners that defendants deem to be a security risk.

Therefore, we conclude that all prisoners are entitled to meaningful access to the courts. If the state denies a prisoner reasonable access to a law library, the state must provide that

prisoner legal assistance. If the parties fail to agree on a plan that provides meaningful access to the courts, the district court shall fashion one that comports with the requirements established in this opinion.

X

ACOUSTICAL WALL COVERINGS

In Part II(6) of the Permanent Injunction, the district court ordered defendants to install, inter alia, sound-absorbing wall-coverings in the five-tier units. 597 F. Supp. at 1423. Defendants do not object to the district court's conclusion that the level of noise in the five tier units inflicts pain without penological justification. They contest the court's remedy. They argue that wall coverings would not reduce the noise perceptibly and would be costly.

The fact that a remedy is costly does not preclude a district court from ordering the remedy. Hoptowit, 682 F.2d at 1247.

The testimony of defendants' expert witness supports the conclusion that the remedy ordered by the court would reduce the noise levels perceptibly. The district court's choice of remedy was a proper exercise of discretion.

XI

ADJUSTABLE HOT AND COLD WATER CONTROLS

In Part II(10) of the Permanent Injunction, the district court ordered that the shower facilities used by inmates in segregation be equipped with adjustable valves for hot and cold water. 597 F.Supp. at 1423. The court found showers necessary to protect the plaintiffs' interest in proper shelter, sanitation, and medical care. Id. at 1399-1400, 1411.

The defendants contend that the remedy was too intrusive. Defendants claim that the district court could have required defendants to provide warm water, rather than hot and cold water.

The court's order is not overly intrusive. The requirement that defendants install hot and cold water controls will necessitate the expenditure of public funds. Defendants, however, do not complain that the cost would be prohibitive. Nor do defendants complain that adjustable controls will interfere with prison security or other legitimate penological concerns. Most importantly, requiring defendants to install adjustable controls will not affect the daily operation of the prison. The adjustable controls will encourage showering and help reduce the adverse effects of confinement in a filthy environment.

We uphold Part II(10) of the Permanent Injunction.

XII

HEALTH CARE AT FOLSOM

The district court determined that the system of health care at Folsom does not manifest deliberate indifference to the

serious medical needs of the prisoners. See 597 F. Supp. at 1414. Plaintiffs appeal this conclusion in respect to several aspects of Folsom's health care system. We will discuss each separately.

A. Access to Medical and Psychiatric Care

The district court found that Folsom employs five physicians, two psychiatrists, and a psychologist to care for 3,500 prisoners. 597 F. Supp. at 1403-04. Medical technical assistants (MTAs) screen inmate complaints. Id. at 1404. MTAs conduct sick call in the lockup units on a daily basis. Id. A physician passes by the cells once a week. Id. MTAs generally determine which inmates will be sent to the infirmary for medical treatment. Id. However, inmates will be allowed to consult a physician if they insist. Id. The court found "that while there may be isolated exceptions, Folsom provides most strictly 'necessary' treatment on a timely, medically sound basis." Id.

Denial of medical attention to prisoners constitutes an eighth amendment violation if the denial amounts to deliberate indifference to serious medical needs of the prisoners. Estelle v. Gamble, 429 U.S. 97, 106 (1976). "Prison officials show deliberate indifference to serious medical needs if prisoners are unable to make their medical problems known to medical staff." Hoptowit v. Ray, 682 F.2d at 1253. The district court found that segregated inmates could be examined or treated by a doctor during the weekly visit or insist on an earlier appointment. Folsom, therefore, does not deliberately deny or delay a prisoner's access to medical care. See Estelle v. Gamble, 429 U.S. at 104-05. Plaintiffs' citations to isolated occurrences of neglect do not amount to a constitutional violation. "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate

indifference to serious medical needs." Gamble, 429 U.S. at 106 (emphasis added).

B. Use of Unqualified Medical Personnel

Plaintiffs argue that defendants place an unconstitutional degree of reliance on MTAs, registered nurses (RNs), and inmate workers. The district court found that the MTAs screen inmates and administer nonprescription drugs. 597 F. Supp. at 1404. Plaintiffs cite testimony indicating that MTAs, RNs, and inmates provide a number of services which they are not qualified to perform. Defendants respond that MTAs, RNs and inmates are qualified to perform a number of services. If plaintiffs correctly contend that unqualified personnel regularly engage in medical practice, precedent indicates that the prison health care delivery system may reflect deliberate indifference to plaintiffs' medical needs. See Hoptowit v. Ray, 682 F.2d at 1252 (district court correctly found eighth amendment violation

where, inter alia, medication was prepared and dispensed by unqualified personnel). Therefore, we must remand for entry of explicit factual findings regarding the nature of services performed by MTAs, RNs, and inmates, their level of medical qualification, and the level of qualification required to adequately render the services that they perform.

C. Confidentiality of Records

Plaintiffs argue that constitutionally adequate medical care cannot be provided without complete medical records, and that medical records are inadequate if they lack confidentiality. Plaintiffs cite Williams v. Edwards, 547 F.2d 1206, 1216 (5th Cir. 1977), for the proposition that medical records are inadequate if they lack confidentiality. In Williams v. Edwards, inmate medical assistants failed to keep any medical records of certain procedures. Id. Nothing in Williams v. Edwards indicates a causal connection between lack

of confidentiality and inadequacy of records. We reject plaintiffs' argument.

D. Lack of Special Medical Diets

The district court found that the only special diet available at Folsom is one designed for treating ulcers. 597 F. Supp. at 1404. Prisoners needing other special diets must await transfer to another institution. Id. Plaintiffs argue that so long as prompt transfers are unavailable, failure to provide special diets is unconstitutional. We disagree. A fair reading of the district court's findings of fact indicates that if a prisoner needs a special diet, eventually he will be transferred to an institution that is equipped to provide it. Neither precedent nor common sense suggests that delay in providing a special diet arises to the level of deliberate indifference. The district court did not abuse its discretion by refusing to order defendants to provide special diets.

E. Medical Facilities

The district court found that in comparison with other parts of the prison, the Folsom infirmary is relatively clean, but that sanitation failed to meet medical standards. 597 F. Supp. at 1404. Plaintiffs argue that inadequate and unsanitary health care facilities violate the eighth amendment.

Plaintiffs' authorities do not support such a broad proposition. In Williams v. Edwards, 547 F.2d at 1217, a "filthy" emergency room was but one factor in determining the existence of deliberate indifference. The filth included the storage of live fish in a whirlpool bath. Id. In Newman v. Alabama, 503 F.2d 1320, 1323 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), the lack of sanitation included the cleaning of linens from patients with hepatitis and tuberculosis

along with the linens of other infirmary inmates.31/ In Lightfoot v. Walker, 486 F.

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31. The lack of health care in the Alabama prisons, which were the subject of Newman v. Alabama, provides a stark contrast with the level of health care at Folsom:

> Immediately before [court] intervention, medical services for Alabama's almost 4,000 prisoners were provided largely at a state medical and diagnostic center. The center maintained no full-time physician; instead, care was provided by three private doctors working part-time at the center, three registered nurses, eight unlicensed former military medics, and a part-time dentist. Facilities at individual prisons were even worse. One unit housing 850 inmates, for example, had no full-time physician and a dentist available only one-half day of each week. Because of understaffing, unsupervised and untrained inmates regularly provided medical services, including minor surgery. The horror stories coming out of such a setting were numerous. Bedsores of a quadraplegic who spent many months at the medical and diagnostic center, for example, became infested with maggots. In the month before his death, he was bathed, and his bandages changed only once.

Yarbrough, The Alabama Prison Litigation, 9

Supp. at 512, surgical instruments were not sterilized, the surgical suite was not cleaned routinely, and clean and soiled linens were stored together.

Unlike Lightfoot and Williams, surgery is not performed at the Folsom infirmary. 597 F. Supp. at 1404. Unlike Williams, the Folsom infirmary is not subject to vermin infestation. Id. Unlike Newman, there is no indication in this case that infirmary officials were so callous to the health needs of the inmates as to mix the laundry of patients with highly communicable infectious diseases with that of the general infirmary inmates. Id.

F. Conclusions Regarding Health Care at Folsom

In sum, Folsom's health care conditions fall below medical standards. The fact that a given condition might constitute medical malpractice, however,

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Just. Sys. J. 276, 277 (1984) (citations omitted).

does not necessarily mean that the condition constitutes cruel and unusual punishment. Estelle v. Gamble, 429 U.S. at 106. It is only deliberate indifference to serious medical needs that can offend "evolving standards of decency" in violation of the eighth amendment. Id. However, the district court's failure to render specific factual findings regarding the level of reliance on unqualified personnel requires a remand for entry of such findings.

XIII

CONTACT VISITATION

The district court held that denial of contact visits to inmates in administrative segregation does not constitute cruel and unusual punishment. 597 F. Supp. at 1413.

Plaintiffs assert that the district court improperly applied a per se rule. They urge us to remand the case to the district court with instructions to reconsider whether all prisoners in

administrative segregation in San Quentin and Folsom are entitled to individualized determinations on their suitability for contact visits.

Plaintiffs cite no authority for the proposition that denial of contact visits constitutes cruel and unusual punishment. Instead, they argue that the evidence adduced at trial demonstrates that contact visitation would have beneficial rehabilitative effects. They contend that "there was unanimity of evidence that contact visits thus are vital to inmate health, as the deprivation of human contact involves extreme suffering and affects both physical and mental health."

Judicial authority uniformly contradicts plaintiffs' assertions. See Ramos v. Lamm, 639 F.2d 559, 580 n.26 (10th Cir. 1980) ("weight of present authority clearly establishes that there is no constitutional right to contact visitation . . . We agree with this view."), cert.

denied, 450 U.S. 1041 (1981); Lynott v. Henderson, 610 F.2d 340, 342 (5th Cir. 1980) ("convicted prisoners have no absolute constitutional right to visitation"); Feeley v. Sampson, 570 F.2d 364, 372-73 (1st Cir. 1978) ("we can discover no constitutional guarantee that [contact visits] may take place."); Oxendine v. Williams, 509 F.2d 1405, 1407 (4th Cir. 1975) ("[prisoner] has no constitutional right to physical contact with his family."); see also Smith v. Coughlin, 748 F.2d 783, 788 (2d Cir. 1984) (contact visits with persons other than priest, lawyer, and doctor could disrupt prison administration, create security risks, and allow smuggling of contraband; denial of contact visits did not violate prisoners' first amendment rights); O'Bryan v. County of Saginan, 741 F.2d 283, 284-85 (6th Cir. 1984) (denial of constitution); Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 758-60 (3d Cir. 1979) (ban on

contact visits does not violate due process rights of prisoners). Expert opinion is entitled to little weight in determining whether a punishment is cruel and unusual. See Rhodes v. Chapman, 452 U.S. at 348 n.13. Plaintiffs' argument, therefore, lacks support. Denial of contact visitation simply does not amount to the infliction of pain. Cf. Hoptowit v. Ray, 682 F.2d at 1254-55.

Even if denial of contact visitation amounted to an infliction of pain, the eighth amendment would not prohibit the denial unless the pain were inflicted wantonly and without penological justification. Rhodes v. Chapman, 452 U.S. at 346. The district court found that no segregated inmate was deprived of all visits and most were allowed contact visits. 597 F. Supp. at 1413. The court found that despite thorough searches, contact visits result in the smuggling of contraband, particularly drugs. Id. at

1403. The court commended defendants for their efforts to improve visiting facilities at Folsom. Id. at 1413 n.44. The court noted that San Quentin was one of the very few maximum security prisons in the nation to allow conjugal visitation for any of its inmates. Id. at 1402 n.25. The court's findings hardly indicate that defendants wantonly inflict pain on the plaintiffs. To the contrary, the district court's findings indicate that denial of contact visitation is based on sound penological justifications.32/

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32. Plaintiffs fault the district court for relying on Block v. Rutherfords, 468 U.S. 576 (1984). In Block, the Supreme Court held that denial of contact visits to pretrial detainees did not violate due process. Id. at 589. As plaintiffs assert, Block is distinguishable on the basis that the pretrial detainees in Block were subject to denial of contact visitation only for a limited period of time. Cf. Hutto v. Finney, 437 U.S. at 686-87 (conditions tolerable for a short period of time are intolerable for a long period of time). The fact that Block is distinguishable, however, does not improve plaintiffs' position.

To the extent that denial of contact visitation is restrictive and even harsh, it is part of the penalty that criminals pay for their offenses against society. Cf. Rhodes v. Chapman, 452 U.S. at 347.

XIV

CONCLUSION

For the reasons stated above, we direct as follows:

1. We reverse the district court's conclusion that Cal. Penal Code §§ 2931, 2933 create a liberty interest triggering due process protections. The Wright I order is vacated. Parts III and IV(D) of the Permanent Injunction are vacated. All release orders are vacated. We hold, however, that 15 Cal. Admin. Code § 3339(a) creates a liberty interest. On remand, the district court shall determine whether the defendants' segregation procedures meet the due process requirements as stated above. If the district court determines that defendants' procedures do not meet the

requirements stated above, and that the defendants are unlikely to comply voluntarily, the district court shall order such relief as it deems necessary to obtain compliance.

2. The district court's conclusions and orders regarding noise reduction (Part II(6)) and adjustable controls for hot and cold running water (Part II(10)) are affirmed.

3. The district court's conclusions and order regarding access to the prison law library (Part II(15)) are affirmed to the extent that the court required defendants to permit segregated prisoners access to the law library. The district court's conclusions are reversed and its order vacated to the extent that the court allowed defendants to rely on a paging system for those prisoners who are denied access because of security reasons. On remand, the district court shall determine how best to accommodate plaintiffs' right

to meaningful access to the courts and defendants' interest in institutional security and economy.

4. The district court's conclusions that denial of work programs and contact visitation does not constitute cruel and unusual punishment are affirmed.

5. The district court's conclusion that the health care system at Folsom does not constitute cruel and unusual punishment is affirmed. However, on remand the district court, if necessary, shall render explicit factual findings regarding the qualifications of personnel rendering medical services in order to allow further appellate review.

6. Each party shall bear its own costs.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

APPENDIX

Cal. Penal Code § 2931. Reduction of term for good behavior and participation; conditions

(a) In any case in which a prisoner was sentenced to the state prison pursuant to Section 1170, or if he committed a felony before July 1, 1977, and he would have been sentenced under Section 1170 if the felony had been committed after July 1, 1977, the Department of Corrections shall have the authority to reduce the term prescribed under such section by one-third for good behavior and participation consistent with subdivision (d) of Section 1170.2. A document shall be signed by a prison official and given to the prisoner, at the time of compliance with Section 2930, outlining the conditions which the prisoner shall meet to receive the credit. The conditions specified in such document maybe modified upon any of the following:

(1) Mutual consent of the prisoner and the Department of Corrections.

(2) The transfer of the prisoner from one institution to another.

(3) The department's determination of the prisoner's lack of adaptability or success in a specific program or assignment. In such case the prisoner shall be entitled to a hearing regarding the department's decision.

(4) A change in custodial status.

(b) Total possible good behavior and participation credit shall result in a four-month reduction for each eight months served in prison or in a reduction based on this ration for any lesser period of time.

Three months of this four-month reduction, or a reduction based on this ration for any lesser period, shall be based upon forebearance from any act for which the prisoner could be prosecuted in a court of law, either as a misdemeanor or a felony, or any act of misconduct described as a serious disciplinary infraction by the Department of Corrections.

(c) One month of this four-month reduction, or a reduction based on this ratio for a lesser period, shall be based solely upon participation in work, educational, vocational, therapeutic or other prison activities. Failure to succeed after demonstrating a reasonable effort in the specified activity shall not result in loss of participation credit. Failure to participate in the specified activities can result in a maximum loss of credit of 30 days for each failure to participate. However, those confined for other than behavior problems shall be given specified activities commensurate with the custodial status.

(d) This section shall not apply to any person whose crime was committed on or after January 1, 1983.

Cal. Penal Code § 2932. Denial of time credits; grounds; limitations; procedure; effect; review; criminal prosecution

(a) For any time credit accumulated pursuant to Section 2931 or to Section 2933, not more than 180 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a felony whether or not prosecution is undertaken, except that not more than one year of credit may be denied or lost for a single act of battery in which great bodily injury is inflicted upon a nonprisoner.

Not more than 90 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a misdemeanor, whether or not prosecution is undertaken. Not more than 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections. Any person confined due to a change in custodial classification following the commission of any serious disciplinary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days of credit which have been lost for such act of misconduct. In unusual cases, an inmate may be denied the opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision if the Director of Corrections finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff or other inmates. At the end of the six-month period and of successive six-month periods, the denial of the opportunity to participate in a credit qualifying assignment may be renewed upon a hearing and finding by the director.

The prisoner may appeal the decision through the department's review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the situation.

(b) For any credit accumulated pursuant to Section 2931, not more than 30 days of participation credit may be denied or lost for a single failure or refusal to participate. Any act of misconduct described by the Department of Corrections

as a serious disciplinary infraction if committed which participating in work, educational, vocational, therapeutic or other prison activity shall be deemed a failure to participate.

(c) Any procedure not provided for by this section, but necessary to carry out the purposes of this section, shall be those procedures provided for by the Department of Corrections for serious disciplinary infractions if those procedures are not in conflict with this section.

(1) The Department of Corrections shall, using reasonable diligence to investigate, provide written notice to the prisoner. The written notice shall be given within 15 days after the discovery of information leading to charges that may result in a possible denial of credit, except that if the prisoner has escaped, the notice shall be given within 15 days of the prisoner's return to the custody of the Director of Corrections. The written notice shall include the specific charge, the date, the time, the place that the alleged misbehavior took place, the evidence relied upon, a written explanation of the procedures that will be employed at the proceedings and the prisoner's rights at the hearing. The hearing shall be conducted by an individual who shall be independent of the case and shall take place within 30 days of the written notice.

(2) The prisoner may elect to be assigned an employee to assist in the investigation, preparation, or presentation of a defense at the disciplinary hearing if it is determined by the department that: (i) the prisoner is illiterate; or (ii) the complexity of the issues or the prisoner's confinement status makes it unlikely that the prisoner can collect and present the

evidence necessary for an adequate comprehension of the case.

(3) The prisoner may request witnesses to attend the hearing and they shall be called unless the person conducting the hearing has specific reasons to deny this request. Such specific reasons shall be set forth in writing and a copy of the document shall be presented to the prisoner.

(4) The prisoner has the right, under the direction of the person conducting the hearing, to question all witnesses.

(5) At the conclusion of the hearing the charge shall be dismissed if the facts do not support the charge, or the prisoner may be found guilty on the basis of a preponderance of the evidence.

(d) If found guilty the prisoner shall be advised in writing of the guilty finding and the specific evidence relied upon to reach this conclusion and the amount of time-credit loss. The prisoner may appeal such decision through the Department of Corrections' review procedure, and may, upon final notification of appeal denial, within 15 days of such notification demand review of the department's denial of credit to the Board of Prison Terms, and the board may affirm, reverse, or modify the department's decision or grant a hearing before the board at which hearing the prisoner will have the rights specified in Section 3041.5.

(e) Each prisoner subject to Section 2931 shall be notified of the total amount of good behavior and participation credit which may be credited pursuant to Section 2931, an his anticipated time-credit release date. The prisoner shall be

notified of any change in the anticipated release date due to denial or loss of credits, award of worktime credit, under Section 2933, or the restoration of any credits previously forfeited.

(f) If the conduct the prisoner is charged with also constitutes a crime, the Department of Corrections may refer the case to criminal authorities for possible prosecution. The department shall notify the prisoner, who may request postponement of the disciplinary proceedings pending such referral.

The prisoner may revoke his request for postponement of the disciplinary proceedings up until the filing of the accusatory pleading. In the event of the revocation of the request for postponement of the proceeding, the department shall hold the hearing within 30 days of the revocation.

In the case where the prisoner is prosecuted by the district attorney, the Department of Corrections shall not deny time credit where the prisoner is found not guilty and may deny credit if the prisoner is found guilty, in which case the procedures in subdivision (c) shall not apply.

(g) If time credit denial proceedings or criminal prosecution prohibit the release of a prisoner who would have otherwise been released, and the prisoner is found not guilty of the alleged misconduct, the amount of time spent incarcerated, in excess of what the period of incarceration would have been absent the alleged misbehavior, shall be deducted form the prisoner's parole period.

(h) Nothing in the amendments to this section made at the 1981-82 Regular Session of the Legislature shall affect the granting or revocation of credits attributable to that portion of the prisoner's sentence served prior to January 1, 1983.

Cal. Penal Code § 2933. Worktime credits on sentences; amount; receipt; forfeiture; restoration; review

(a) It is the intent of the Legislature that persons convicted of crime and sentenced to state prison, under Section 1170, serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Director of Corrections for performance in work, training or education programs established by the Director of Corrections. Worktime credits shall apply for performance in work assignments and performance in elementary, high school, or vocational education programs. Enrollment in a two- or four-year college program leading to a degree shall result in the application of time credits equal to that provided in Section 2931. For every six months of full-time performance in a credit qualifying program, as designated by the director, a prisoner shall be awarded worktime credit reductions from his term of confinement of six months. A lesser amount of credit based on this ration shall be awarded for any lesser period of continuous performance. Less than maximum credit shall be awarded pursuant to regulations adopted by the director for prisoners not assigned to a full-time credit qualifying program. Every prisoner who refuses to accept a full-time credit qualifying assignment or who is denied the opportunity to earn worktime credits pursuant to subdivision (a) of Section 2931 shall be awarded no worktime

credit reduction. Every prisoner who voluntarily accepts a half-time credit qualifying assignment in lieu of a full-time assignment shall be awarded worktime credit reductions from his term of confinement of three months for each six-month period of continued performance. Except as provided in subdivision (a) of Section 2932, every prisoner willing to participate in a full-time credit qualifying assignment but who is either not assigned to a full-time assignment or is assigned to a program for less than full time, shall receive no less credit than is provided under Section 2931. Under no circumstances shall any prisoner receive more than six months' credit reduction for any six-month period under this section.

(b) Worktime credit is a privilege, not a right. Worktime credit must be earned and may be forfeited pursuant to the provisions of Section 2932. Except as provided in subdivision (a) of Section 2932, every prisoner shall have a reasonable opportunity to participate in a full-time credit qualifying assignment in a manner consistent with institutional security and available resources.

(c) Under regulations adopted by the Department of Corrections, which shall require a period of not more than one year fee of disciplinary infractions, worktime credit which has been previously forfeited may be restored by the director. The regulations shall provide for separate classifications or serious disciplinary infractions a they relate to restoration of credits; the time period required before forfeited credits or a portion thereof may be restored; and the percentage of forfeited credits or a portion thereof may be restored; and the percentage of forfeited credits that may be restored for

such time periods. No credits may be restored if they were forfeited for a serious discipinary [sic] infraction in which the victim died or was permanently disabled. Upon application of the prisoner and following completion of the required time period free of disciplinary offenses, forfeited credits eligible for restoration under the regulations shall be restored unless, at a hearing, it is found that the prisoner refused to accept or failed to perform in a credit qualifying assignment or extraordinary circumstances are present that require that credits not be restored. "Extraordinary circumstances" shall be defined in the regulations adopted by the director.

The prisoner may appeal the finding through the Department of Corrections review procedure, which shall include a review by an individual independent of the institution who has supervisorial authority over the institution.

(d) The provisions of subdivision (c) shall also apply in cases of credit forfeited under Section 2931 for offenses and serious disciplinary infractions occurring on or after January 1, 1983.

15 Cal. Admin. Code § 3335. Administrative Segregation.

(a) When an inmate's presence within an institution's general inmate population presents an immediate threat to the inmate's own safety, the safety of others, endangers institution security or jeopardizes the integrity of an investigation into alleged serious misconduct or criminal activities, the inmate will be immediately removed from general population and be placed in administrative segregation. Administrative

segregation may be accomplished by confinement in a unit designated for that particular purpose or, in an emergency, to any single cell unit capable of providing segregation from the general population and the degree of security and control required of the reason for such placement.

(b) An inmate's removal from general population and placement in a segregated unit for any reason except as provided in Section 3340 will be considered as administrative segregation until such time as a disciplinary or classification hearing has been held on the reasons or need for separation from the general population and other housing is designated.

15 Cal. Admin. Code § 3336. Segregation Order.

Authority to order an inmate to be placed in administrative segregation, before such action is considered and ordered by classification hearing, may not be delegated below the staff level of correctional lieutenant or correctional program supervisor III, except when a lower level staff member is the highest ranking official on duty.

(a) The reason for ordering an inmate's placement in administrative segregation will be clearly documented on a CDC Form 114-D (Order and Hearing on Segregated Housing) by the official ordering the action at the time the action is taken.

(b) In addition to explaining the reason and need for an inmate's placement in administrative segregation, the official ordering the action will determine if a staff member needs to be assigned to assist the inmate in presenting the inmate's

position at a classification hearing on the need for retention in segregated housing. Staff assistance will be assigned and the assignment will be noted on the CDC Form 114-D if the inmate is illiterate or if the complexities of the issues make it unlikely that the inmate can collect and present evidence necessary for an adequate comprehension of the inmate's position at a classification hearing. If an inmate is not illiterate and the issues are not complex, staff assistance will not be assigned. The reason for not assigning staff assistance will be entered on the CDC Form 114-D.

(c) In assigning staff assistance, the official initiating the CDC Form 114-D will designate the inmate's caseworker by name, as the staff member to assist the inmate. If the assigned caseworker's name is not known or cannot be readily determined by the official initiating the CDC Form 114-D, the words "assigned caseworker" will be entered on the form.

(d) A copy of the CDC Form 114-D with the "order" portion of the form completed, will if practical, be given to the inmate prior to placement in administrative segregation but not later than 48 hours after such placement. Copies of the CDC Form 114-D with the "order" portion completed will also be submitted to the warden or superintendent or designated staff for review and possible further action as described in section 3337. A copy of the CDC Form 114-D will also be routed to the records office as a notice of the inmate's current status and pending actions.

15 Cal. Admin. Code § 3339. Release From Administrative Segregation and Retention in Administrative Segregation.

(a) Release: Release from segregation status shall occur at the earliest possible time in keeping with the circumstances and reasons for the inmate's initial placement in administrative segregation. Nothing in this article shall prevent the official ordering an inmate's placement in administrative segregation, or a staff member of higher rank in the same chain of command from withdrawing an administrative segregation order before it is acted upon or prior to a hearing on the order after consulting with and obtaining the concurrence of the administrator of the general population unit to which the inmate will be returned or assigned. Release from segregated housing after such placement shall be effected only upon the written order of an equal or higher authority.

Original Filed
Oct. 18, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al.,	)	
	)	
Plaintiffs,	)	
	)	No.
v.	)	C-73-1422 SAW
	)	
DANIEL J. McCARTHY, et al.,	)	
	)	
Defendants.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

The following Findings of Fact and Conclusions of Law underlie the Court's decision on the merits of a class action challenging the legality of conditions of confinement for prisoners held in administrative segregation--hereafter referred to as "segregation"--in the California State Prison at San Quentin ("San Quentin").[1/] The lengthy history of the litigation was recounted in some detail

in connection wit the preliminary injunction entered in this case on January 14, 1983, see Toussaint v. Rushen, 553 F.Supp. 1365, 1367-69 (N.D.Cal. 1983), vacated in part, 722 F.2d 1490 (9th Cir. 1984), and need not be repeated here. The preliminary injunction was affirmed by the Ninth Circuit on January 5, 1984, except for one portion dealing with food service, which was vacated because unsupported by specific findings, Toussaint v. Yockey, 722 F.2d 1490 (9th Cir. 1984).

The first phase of trial on the merits commenced in this Court on November 7, 1983. It was limited to conditions at the San Quentin and Folsom prisons largely because of representations made by defendants that segregation at Soledad and Tracy would soon be discontinued. Trial lasted nearly two months. More than 65 witnesses testified. There are well over 1000 trial exhibits. The transcript is 4643 pages long. In addition, the Court,

accompanied by counsel for both sides, inspected the premises at San Quentin.

The findings and conclusions which follow are based upon the Court's independent review of all the evidence as well as upon consideration of the findings and conclusion proposed by both sides. As detailed below, the Court finds and concludes that conditions of confinement for segregated inmates at San Quentin and Folsom violate the Eighth and Fourteenth Amendments to the United States Constitution and that relief previously ordered in this case to correct constitutional violations has not been fully effective.[2/] The Court accordingly renders a Judgement of Permanent Injunction ordering termination of the unlawful conduct of defendants and providing for the appointment of a Special Master to monitor compliance.

The Eighth Amendment to the Constitution prohibits the infliction of

"cruel and unusual punishments." The ultimate question in this case is whether the defendants, officials of the State of California, have violated this prohibition by confining prisoners under the conditions that obtain in segregation units at San Quentin and Folsom. To answer this question is difficult, because no static "test" can be formulated to determine whether conditions of confinement are "cruel and unusual." Rhodes v. Chapman, 452 U.S. 337, 346 (1981). Rather, the meaning of the Eighth Amendment prohibition is to be drawn "from the evolving standards of decency that mark the progress of a maturing society." Id.; Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion). Ordinarily, the Court's judgment as to the nature of these standards should be governed to the maximum possible extent by objective indicia of what the general public would consider decent.[3/] See Rhodes, 452 U.S. at 346; Hoptowit v. Ray,

682 F.2d 1237, 1246 (9th Cir. 1982). But public perceptions are not alone conclusive. In the cogent words of Chief Justice Warren, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." Trop, 356 U.S. at 100; see Gregg v. Georgia, 428 U.S. 153, 178 (1976) (plurality opinion).

In the context of cases challenging prison conditions, courts in this circuit and others have commented that "[a]n institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety." Hoptowit, 682 F.2d at 1246;1 Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981); Wolfish v. Levi, 573 F.2d 118, 125 (2nd Cir. 1978), rev'd on other grounds, 441 U.S. 520 (1979); see also Newman v. State of Alabama, 559 F.2d 283, 286 (5th Cir. 1977), rev'd on other grounds sub nom. Alabama v. Pugh, 438 U.S.

781 (1978). Of course, this enumeration is not necessarily exhaustive. For example, it is settled that prisoners may not be deprived of all exercise, because "some form of regular outdoor exercise is extremely important to the psychological and physical well-being of the inmates." Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979) (citing cases); Ruiz v. Estelle, 679 F.2d 1115, 1152 & n. 173 (5th Cir. 1982), cert. denied, 103 S.Ct. 1438 (1983); Martino v. Carey, 563 F.Supp. 984, 1001 (D.Ore. 1983).

The task before the Court is to examine each specific challenged condition of confinement and to determine whether that condition, in the context of the overall prison environment, comports with human decency. Wright v. Rushen, 642 F.2d at 1133. If found indecent, the condition must be remedied. However, the relief granted must be only so much as is required to correct the specific deficiency.

Hoptowit, 682 F.2d at 1247; Wright, 642 F.2d at 1134.

II. FINDINGS OF FACT

1. San Quentin and Folsom are among the oldest penal institutions still in use in the United States today. San Quentin first opened in 1853; Folsom in 1880. The buildings presently used to house the majority of segregated inmates are relatively old and outmoded five-tier cell blocks constructed between 1910 and 1934.[4] Segregated inmates are also housed in two more modern buildings, SHU I at Folsom and the "Adjustment Center" at San Quentin. The latter was built in 1959 and 1960.

2. The class of plaintiffs in this action is defined principally by reference to the percentage of each day that they are required to spend in their cells.[5] The term "segregated inmate" means, at bottom, one who is not permitted to mingle with the general prison population. To accomplish segregation, prison officials at San

Quentin and Folsom lock inmates in their cells on a round-the-clock basis. Under this system, segregated inmates are allowed out of their cells only for essential activities such as showers, exercise, visits, medical treatment and classification hearings. During all such excursions, segregated inmates are made to wear handcuff restraints except when they are actually showering, exercising or contact visiting. In the record and in these findings, this form of confinement is referred to interchangeably as "segregation" or "lockup."

3. According to a former warden, approximately 2100 inmates are typically held in segregated confinement at San Quentin at any one time. Upwards of 500 are so held at Folsom. Credible testimony presented at trial disclosed that the concentrated confinement of such large numbers of segregated inmates is extremely

rare, if not unprecedented, in the history of American corrections.

4. The reasons why inmates are assigned segregated status at San Quentin and Folsom vary. Formally, they may be placed in three categories. First, inmates are segregated as punishment for disciplinary rule infractions. This sort of lockup is commonly referred to as "segregated housing" or "SHU." Second, inmates are segregated because of an institutional perception that they pose a threat to the safety of other inmates or staff, or to the security of the institution. This type of lockup is sometimes called "management control." Third, inmates are segregated because of a perception that the inmates themselves may be harmed by other inmates if they must mingle in the general population. This variety of lockup is sometimes called "protective housing."

5. In addition, there is a fourth term used to describe a form of segregated status: "Administrative segregation." Although sometimes used as a catchall to refer to lock generally, "administrative segregation" technically refers only to a temporary status to which an inmate is assigned for a period of up to 30 days p;ending a determination of whether he should be assigned more permanent "segregated" status for one of the three reasons listed above. Evidence at trial showed that many or most prisoners newly arriving at San Quentin or Folsom are initially placed in "administrative segregation" for a period of "orientation."

6. Present policies of the California Department of Corrections call for the housing at San Quentin and Folsom "Level IV" inmates. These are inmates classified as requiring the highest level of security in custody, based on their precommitment history, commitment offense, term of

imprisonment, and other case factors.[6/] Most have had, in essence, a life of crime, sometimes going back to age six or seven. San Quentin is particularly notorious for its "irascible population" and "aura of brutality." In a report prepared by the Board of Governors of the state Bar of California, received in evidence, San Quentin was characterized as California's "Devil's Island." The inmate population at Folsom is not materially different. As many of the plaintiffs in this case are among the most antisocial and violent of the inmates held in the two prisons, they pose formidable behavior problems for correctional staff.

Following are the Court's findings concerning each condition of confinement challenged by plaintiffs.

A. Segregation Cells

7. The cells in which plaintiffs are presently housed at San Quentin are located in four buildings: The Adjustment Center

(SHU), South Block (SHU "B" or "Badger," "C" or "Carson," and "D" or "Donner" Sections), East Block (MCU) and North Block (MCU). At Folsom, plaintiffs are housed in two buildings, referred to herein as "SHU I" (Building 4) and "SHU II" (Building 1, Sections B and C).

8. South Block, East Block, and North Block at San Quentin, and SHU II at Folsom, are five-tier cell blocks. That is, they contain five rows, or "tiers," of cells stacked vertically atop one another. Outside the barred fronts of the cells runs a walkway, also enclosed by bars, and outside the walkway, approximately 20 to 30 feet of open space extends unbroken from the bottom of the first tier to above the top of the fifth tier. On the wall behind the open space, opposite the cell fronts, other walking platforms called "gunwalks" are mounted. This wall also contains windows. For most of the cells in these cell blocks, the windows across the open

space and behind the gunwalks are the sole source of natural light.

9. The Adjustment Center at San Quentin and SHU I at Folsom are more modern in design. The cells are arranged in separate floors, with their fronts facing on enclosed corridors.

10. The cells used to house segregated inmates in all of these units are basically similar. All are between five and six feet in width, and between eight and ten feet in length. The smallest is 45.5 square feet (Folsom SHU I), while the largest is 56 square feet (San Quentin Adjustment Center). Most lockup prisoners are housed in cells measuring 48 (San Quentin five-tier cell blocks) or 49.5 (Folsom SHU II) square feet. These cells are generally furnished with one or two bunk beds, a coverless toilet, a sink, a shelf, and a small mirror. The fronts of the cells are open, except for bars. The remaining walls, ceiling and floor are sold

and windowless. The cells also have a light, sometimes mounted on the ceiling and sometimes on the back wall. Most, if not all contain one double electric outlet.

11. A small number of these cells have, in addition, a solid outside door with only a small window or now window. Since the door admits virtually no natural light, and the electric light is controlled from the outside, these cells can be made completely dark indefinitely at the discretion of correctional authorities. So used, they are called "quiet cells." Although the use of quiet cells is not officially permitted, evidence at trial established that prisoners are in fact confined in such cells during the daytime with the solid door closed and the light turned off from the outside.

12. Plaintiffs are restricted to their cells at all times, except when there is some specific reason for permitting them to be elsewhere. Plaintiffs are thus

required to perform all functions of eating, sleeping, and elimination within the cells. Not uncommonly, a segregated inmate may languish five or more consecutive days locked inside his cell, never once setting foot outside the cell.

B. Double-Celling

13. Until recently, some lockup inmates at both San Quentin and Folsom were involuntarily double-celled.[7/] Because only about eighteen inches separate the bunks from the opposite wall, one of the two inmates must remain on his bunk at all times if the other is to move freely about the cell. The distance between the surface of the top bunk and the ceiling is insufficient to permit a man to sit upright on that bunk. Confining two inmates together in a cell of the dimensions here involved, under the conditions prevailing in lockup at San Quentin and Folsom, deprives each of any semblance of privacy, since neither is permitted to leave the

cell. Such confinement, in the midst of the other abhorrent conditions detailed below, engenders violence, particularly violence between cellmates. The stronger of the inmates generally establishes psychological, physical, and often sexual dominance over the other.

14. The overwhelming majority of witnesses for both sides at trial sharply criticized the practice of double-celling under conditions prevailing in lockup at San Quentin and Folsom. Two witnesses who have been defendants in this case (former California Director of Corrections Ruth Rushen and former San Quentin Warden George Sumner) stated that such double-celling is "inhuman." The Court so finds.

C. Heating and Ventilation

15. In the San Quentin Adjustment Center and Folsom SHU I, the heat in cells used to house segregated inmates is adequate. In the remaining buildings, used to house most plaintiffs, it is not. At

San Quentin, each five-tier cell block is supposed to be heated by an internal gas heater and ventilating system. Frequently these systems do not work, even in the winter. The chill resulting from lack of heat is compounded by numerous broken windows, which admit cold air and moisture.[8/] Moisture also enters the units through leaky roofs and overflowing sinks, toilets, and showers. The result has been aptly described as a "chilly mist" that dampens everything in the cell blocks, particularly at night. Conditions in SHU II at Folsom are similar. Consequently segregation inmates at both prisons complain of "freezing." To combat the chill, many wear all their clothing at all times, even while sleeping. Many also huddle under blankets for warmth, even during the day. One inmate testified that to combat what he called the "miserable cold" inside Folsom SHU II during the winter of 1982-83, he usually lay fully

dressed beneath two blankets with a layer of newspaper between. Lockup inmates also frequently cover their cell bars with cardboard or paper in an effort to keep out the cold breezes that sweep through the units. Recognizing the existence of drafts, prison guards commonly permit this practice, although it is officially prohibited for reasons of security and fire safety.

16. Most lockup buildings lack functional ventilation systems. An expert who conducted tests in all lockup units found no measurable air movement in any except the East Block MCU at San Quentin.9/ A putrid odor lingers about the units. This odor is caused by the bodily functions of the inmates, eating, sleeping and eliminating under crowded conditions in the same immediate area. In addition to giving rise to a foul living environment, the lack of adequate ventilation fosters the spread of communicable disease among the inmates,

and particularly among double-celled inmates. During the summer, some of the cell blocks become exceedingly warm, particularly in the upper tiers.

D. Plumbing

17. Evidence at trial established that the plumbing and sewage disposal systems in lockup units at both prisons are antiquated, deteriorated, and in need of replacement. These systems have simply broken down from years of very heavy use without adequate preventive maintenance. Sewage pipes at San Quentin are rotten and frequently clog, causing raw sewage to back up into the lockup units. This, of course, intensifies the foul odor an disease hazards in the units. So too does the fact that sewer caps are missing, allowing methane, a nauseating and potentially explosive gas to escape into prison buildings. The sewer system at Folsom also suffers from "major" problems, according to the Chief of Plant Operations at the

prison. The plumbing system at both prisons exhibits symptoms of serious age deterioration, including corrosion and leakage.10/

18. In-cell plumbing is hardly better. Leaks are prevalent in both cell toilets and sinks. The leaking water flows onto the floors of the tiny cell cubicles, further exacerbating the damp, cold conditions that frequently obtain. Often these leaks are not repaired for long periods. Toilet and sink drains malfunction and clog on frequent occasions.11/ Sometimes, but not always, these problems are caused by the misbehavior of inmates who occupy the cells and who flush improper items.

19. Behind the back walls of the cells in each unit, to which the sinks and toilets are connected, runs a service area or "pipe chase." The condition of these areas, as demonstrated by uncontradicted evidence, is shocking. Plumbing pipes leak

in various places, as do broken sewage mains and steam water lines. An environmental expert identified in the bottom of more than one pipe chase waste material from a sewer cleanout, including human feces, and rotting garbage. The filth in these service areas adds to the general stench in the immediately adjacent cell area. It provides an ideal medium in which the cockroaches and rats that infest both prisons spawn and thrive. These appalling conditions, in close proximity to the living area, pose a substantial hazard to the health of segregated inmates.

20. Another serious health hazard recurrent in the five-tier units is standing water. Stagnant pools are common in the showers, where drains are often clogged. Puddles also accumulate from time to time in the bottoms of the cellblocks, which are not always equipped for adequate drainage. Cells occasionally flood as a

result. These pools foster vermin, including mosquitoes, and mildew.12/

E. Lighting

21. As described above, cells in the five-tier units admit little natural light. The only source of such light is the wall across from the fronts of the cells. The cells are but dimly lit from inside. Generally they are equipped with one bare light bulb.13/ This produces a maximum cell illumination of between 7 and 15 foot-candles. Illumination of 20 foot-candles is deemed an "essential" standard for the housing of inmates by the American Correctional Association (ACA). The Society of Illuminating Engineers considers 30 foot-candles the minimum required for reading and writing without headaches or eyestrain. The uncontradicted evidence establishes that the great majority of inmates in all lockup units at both prisons lack sufficient light in their cells to

read comfortably while seated or lying on their bunks.[14]/

F. Noise

22. The unrelenting, nerve-racking din that fills the segregation units was roundly condemned by every witness who addressed the subject. The constant racket, while a problem in all units, is worst in the five-tier cell blocks at San Quentin. Next worse is Folsom SHU II, which is lightly quieter due to a prison rule requiring the use of earphones with televisions, radios and stereos. Hardly quiet, but more tolerable, are the two more modern facilities, the Adjustment Center at San Quentin and SHU II at Folsom. These buildings are less noisy because they are divided into separate floors. In the cell blocks, consisting of five stories of acoustically unitary space, sound reverberates freely, magnifying noises of all kinds. The cell blocks are devoid of any sound absorbing material.

23. The sources of bedlam are as varied as the activities performed within the units. Radios and televisions blare. Gates clang open and shut. Inmates, held under conditions of "isolation" in which they cannot see each other, shout at the top of their voices in attempts to communicate with their fellows. An acoustics expert scientifically measured sound levels prevailing in a San Quentin B Section cell and found that the typical average daytime sound level is in the range of 70 to 75 dBa, a level likened to a noisy vacuum cleaner or a freight train at a distance of about 100 feet. The expert further stated that while conducting these tests, he was at times unable to make himself understood, even by shouting, with a guard standing only about 15 feet away. After midnight, dBa levels drop, reaching an average of low in the range of 60 dBa between 5 and 6 o'clock a.m. This compares with a noisy office.15/

24. The unceasing racket exerts a profound impact o lockup inmates, some of whom consider it to be the single worst aspect of their confinement. Many shove paper, erasers, and other foreign objects into their ears in an attempt to shut it out. Noise contributes to the great difficulty many experience in sleeping. Doctors at both prisons testified that the "relentless" roar adversely affects the mental health of segregated inmates. The noise dulls the thinking of the prisoners and even damages the hearing of some.

G. Electrical Systems

25. The electric wiring in both prisons is antiquated and would not meet the most general of building codes. In the cell blocks, wiring has been altered to enable inmates to use multiple appliances within their cells. The result has been characterized as an "electrical nightmare." Connection boxes are not covered, many connections are made in open space, and

bare wires are visible. In many cells, outlets dangle by exposed wires. Electric wires are also exposed in showers at San Quentin. San Quentin lockup inmates lacking running hot water in their cells employ "stingers," electric coil devices, to heat water. All of these conditions entail serious dangers of electrocution. In addition, the power systems in lockup units at each prison are overloaded. Outages are common.

26. The many exposed wires create a severe fire hazard. The danger is particularly acute in the "pipe chase" service areas, where wires can become wet due to leaky plumbing. The service areas display visible evidence of fires. Inmates also suffer burns because very often their cells have no functioning switches and they must turn out the light by unscrewing the bulb by hand. The electrical systems in lockup units of each prison need complete remodeling.

H. Fire Safety

27. Fire hazards abound in lockup units at both prisons. These include the electric wiring, described above, the cell bar coverings, described above, and many flammable materials stored inside inmate cells. Minor fires are relatively frequent occurrences within lockup units, largely because inmates employ "burning" as a technique for protest or just to get attention. Arson directed at specific inmates is a cause of fire as well. Despite the concrete and steel composition of the cell block structures, tests show that fires can rage extremely hot, reaching temperatures exceeding 2000° Fahrenheit.

28. In the light of these hazards, fire preparedness at both prison is very poor. Many essential firefighting resources are lacking.16/ None of the lockup units has a sprinkler system. Only the San Quentin Adjustment Center has smoke detectors. The ventilation systems are

inadequate to remove the smoke that accumulates in the upper tiers of cell blocks during even minor fires. Lockup inmates receive no instructions for procedures to be followed in the event of a serious fire, nor do they participate in fire drills. Evacuation would quickly become difficult or impossible during such a fire due to physical conditions. Many inmates would have to travel substantial distances to reach fire exits. Cell bars would swell with heat, making the doors difficult or impossible to open without the so-called "Jaws of Life" apparatus. Certain keys needed to open some cells are not kept in the units at all times, and the necessity of retrieving them could occasion further delay.

29. All of these factors create a substantial risk that a major fire will break out in one of the segregated units, killing tens or hundreds of inmates. Such a tragedy has yet to occur, though there

has been at least one fatal fire in lockup during the pendency of this action. At San Quentin on May 30, 1981, two inmates died of smoke inhalation. In that instance, the metal in the cell door expanded and the door when unlocked could not be opened.

I. Earthquake Safety

30. San Quentin is located in an earthquake-prone geographic zone. Structural deficiencies amounting to seismic hazards have been identified in two San Quentin buildings used to house segregated inmates: East Block and South Block. South Block is particularly suspect due to renovations that have added features of low structural integrity such as free-standing concrete partitions.

J. Clothing, Laundry and Bedding

31. California state-authorized prison inmate clothing falls into two categories: "whites" (underwear, socks and towels) and "blues" (shirts and jeans).

Present prison policy calls for lockup inmates to receive one exchange of both types every week.17/ In practice, laundry exchange is often not accomplished weekly.18/ Delays in laundry exchange are particularly troublesome at San Quentin, where inmates complain of having gone for as long as five months without a change of blues, and for weeks without a change of whites. Such delays have been caused by boiler failures, and by "lockdowns" of the general prison population, which deprive the laundry of its work force. When clothes are exchanged, inmates sometimes receive items that are torn, that have broken zippers, or that do not fit.

32. Plaintiffs are commonly assigned to cells furnished with mattresses that are dirty and foul-smelling, stained with water, urine, mildew and food. Mattresses in this condition are not subject to exchange. Some are infested with bedbugs. Almost all are "flat" as a result of long

use. Lockup cells commonly lack pillows, and pillows that are present are frequently in poor condition, tattered and leaking. Blankets issued to lockup inmates are often filthy and torn.

K. Personal Hygiene

33. Segregated inmates at both prisons are denied routine access to the most fundamental requirements for sound personal hygiene: showers and hot running water. Institutional policy permits segregated prisoners to shower indoors two or three times weekly. In addition, some prisoners have an opportunity to shower outdoors in the course of "exercise."19/ Like laundry exchanges, showers are not always provided as often as they are supposed to be. Lockup inmates have on occasion been locked in their cells without showers for up to three weeks. More commonly, showers are restricted to about one per week due to faulty boilers, a lack of shower space, or a lack of guards for

escorting inmates to and from the showers. The Court credits the testimony of former San Quentin Warden Pulley, who stated that the lack of sufficient showers contributes to the overall "inhumane" conditions now prevailing in lockup.

34. The shower facilities themselves are revolting. Many, particularly in the five-tier cell blocks, are simply converted cells without ventilation of any kind. Due to accumulated filth and clogged drains, ponds of stagnant water commonly stand on the shower floors. This condition causes inmates to slip and fall, and also fosters the spread of mosquitoes, fungus, mold and mildew, all of which are prevalent. Prior to the issuance of this Court's preliminary injunction, inmate tier tenders were not generally permitted to clean the showers. Since entry of the injunction, sanitation in the showers has improved in some lockup units.

35. No five-tier cell block used to house lockup inmates at San Quentin has hot running water in its cells.[20/] Thus, inmates in these cells may obtain access to hot running water for hygienic purposes as little as one time per week. As one consequence, inmates commonly resort to the use of "stingers" to heat water in their sinks, a practice that is a fire hazard, an electrocution hazard, and a severe power drain on the overloaded electrical systems.

L. General Sanitation

36. The infrequency of access to hot running water is especially distressing because lockup inmates must spend their days and nights confined in the midst of deplorable filth. All segregated inmates are fed in their cells, but they are given no wastebaskets or other containers in which to store solid refuse. They are expressly instructed to throw all rubbish out onto the tiers or floors in front of their cells, where it later swept away by

inmate tenders. The tiers and floors are not regularly mopped, and are encrusted with the remnants of years of deposited waste matter. Garbage can remain for hours on the tiers or floors and also, in the five-tier units, on the bottom of the cell block, where it accumulates after the tiers are swept. Waste material is removed from the bottom of the cell blocks by sweeping and hosing, a method grossly deficient by public health standards. Moreover, the gutters become plugged with rotting food and excess paper, allowing water to back up and causing additional bad odors. A correctional counselor employed at San Quentin likened the constant smell in his unit to that in a "recently-used toilet."

37. Lockup cells are also filthy. Contributing factors include the in-cell feeding system, chronic toilet backups as well, often, as the conduct of inmates themselves. However, as to the last, cells

are not always cleaned between occupancies and inmates often cannot obtain necessary cleaning materials such as soap and scrub rags or brushes. Even diligent application of such materials cannot remove all of the grime accumulated on the floors, walls, and bars of the cells.

38. The two smaller, more modern units are cleaner than the five-tier cell blocks, which may be too large and dilapidated to be returned to a satisfactory state of cleanliness. The total lack of sanitation prevailing in the cell blocks serves as a constant indecent reminder that the residents are regarded and treated as caged animals, not human beings.

N. Pests

39. Lockup units at San Quentin and Folsom are plagued by a variety of pests that thrive upon the accumulated filth. Folsom SHU II tiers are infested with cockroaches and mice. Rats enter the first

tier gutters to feed upon the refuse collected there. The San Quentin cell blocks are infested with all of these, plus flies and mosquitoes.21/ Birds fly in and out of unscreened windows in the segregation cell blocks of both prisons, where they inhabit the tops of the units. All these infestations pose a serious danger to the health of inmates. In the face of this danger, defendants bring in outside contractors in vain attempts to exterminate. Despite strong recommendations from state sanitarians, neither prison has even one full-time employee charged with the task of alleviating the enormous pest problems.

N. Food

40. All lockup inmates eat all of their meals in their cells. Meals are prepared in central kitchen facilities used to support prison dining generally. Serious deficiencies in sanitation and active mouse and insect infestations in the

San Quentin prison kitchen were documented in the findings and conclusions of the court in Wilson v. Deukmejian, No. 103454, at 10-14, 19 (Cal. Superior Court filed Sept. 13, 1983), which concluded that conditions there constitute "a threat to the physical health of the inmates and fall below contemporary standards of decency." From the evidence presented here, this Court agrees. The evidence established a number of noisome practices and conditions in addition to those remarked upon in Wilson: Examples include open and exposed meats in an unclean, improperly sealed meat cooler and meats stored at substandard temperatures, between 55 and 60 degrees, providing an ideal medium for food-borne disease-producing bacteria.

41. Bad as San Quentin kitchen conditions are, conditions in the kitchen facility at Folsom are , in the words of an expert who inspected both kitchens, "incredibly worse." Among his

uncontradicted observations were: (1) an active infestation of rats;[22/] (2) an active infestation of both roaches and flies; (3) pools of standing water in the kitchen; (4) inadequate ventilation, resulting in heavy deposits of grease and grime on exposed surfaces, and condensation dripping from those surfaces, potentially into food; (5) exposed electrical wires; (6) unsanitary, unclean food contact surfaces; (7) dried food residues on food preparation equipment ; and (8) greasy, slippery floors made of porous rather than impervious materials. The walls are composed of granite, and cannot be adequately cleaned. The expert's testimony was corroborated by that of a highly credible inmate witness, a physician prior to entering prison life. This inmate also testified that while working in the Folsom kitchen, he was sometimes instructed to use cheese or meat in sandwiches even though it was spoiled. He further stated that during

several periods lasting two or three days, large numbers of inmates complained to him of symptoms of stomach cramps, diarrhea, and vomiting resembling those characteristic of food poisoning. Prison medical logs do not record any such episodes. However, evidence indicated that such outbreaks would not necessarily be recorded.

42. For in-cell feeding, food is often left uncovered during delivery. This fosters the growth of bacteria. Food often arrives contaminated with foreign objects such as roaches, hair, and, incredibly, bits of plastic from shoes.

43. This case involves no claim that food served to lockup inmates is nutritionally deficient. Nor would such a claim be supported by the evidence. However, the evidence amply demonstrates that the food served to segregated inmates in both prisons is stored, prepared and served under conditions so unsanitary that

the food adversely affects the health of the inmates.

O. Exercise

44. The confinement to which segregated inmates are normally subject, locked inside a cell less than 50 square feet in dimensions, allows very little meaningful exercise and is physically debilitating. Prisoners consistently suffer from extreme muscular soreness and weakness. One inmate held in lockup without exercise for 41 days, credibly testified that when released from custody at the end of that period, he experienced great difficulty in walking the necessary two and one-half blocks to freedom.

45. Most SHU, management control, and protective custody inmates are provided with some minimal opportunity to engage in out-of-cell exercise. "Administrative segregation" inmates are not. "Exercise," in the case of all plaintiffs, means outdoor exercise, because no indoor

facilities are available. If it rains during a scheduled exercise period, the prevailing policy is either to cancel exercise (Folsom) or to afford inmates the option of forgoing exercise (San Quentin). If rain begins while inmates are in the exercise yard, they must still remain there until the end of the scheduled exercise period.[23/] For this reason, on threatening or inclement days inmates bring with them to the yard plastic bags with a slit in the top, locally known as "San Quentin raincoats." Though officially considered contraband, this makeshift apparel is the only rain gear available to lockup inmates, and appears generally to be permitted by the guards.

46. In the preliminary injunction, the Court ordered that

> [u]nless precluded by temporary and compelling exigencies, each prisoner shall be provided with outdoor exercise at least one (1) hour every day or two (2) hours every other day, for a minimum total of eight (8) hours a week,

> or at least three (3) times a week, for a minimum total of ten (10) hours a week.

Toussaint v. Rushen, 553 F.Supp. at 1385. Defendants admit that a substantial number of segregated inmates do not receive this much exercise.[24/] The remainder are accorded at best the bare minimum. None exercise daily. Exercise is commonly curtailed or eliminated during institutional "lockdowns," which may be completely unrelated to the behavior of lockup prisoners. The record shows that some inmates endure periods of weeks or even months with no out-of-cell exercise whatever. For most, exercise is irregular. The exercise accorded is insufficient in the case of most lockup prisoners to offset the severely debilitating effects of continuous confinement in a cramped cell.

P. Visitation

47. The visits allowed inmates of California prisons fall into three

categories. The first is "non-contact visits." In these, the inmate and the visitor view each other through a glass or plastic barrier. The second is "contact visits." In these, the inmate and his visitor sit together in a common room. They are permitted to touch each other and, in limited measure, to kiss. The third is "family visits," also referred to as "conjugal visits." In these the inmate and his visitor (to whom he must be legally related) spend a night or a weekend together in a specially designed housing facility.25/ Sexual relations between spouses are permitted.

48. Family visiting and contact visiting are considered by prison authorities to be "privileges" that may be withdrawn. With a few exceptions, plaintiffs as a class have very limited privileges. They are not allowed family visits. Normally they are permitted relatively frequent contact visits;

however, SHU inmates in San Quentin South Block may have contact visits only if they are free of serious disciplinary infractions for a substantial period, officially one year. Other South Block SHU inmates and "administrative segregation" inmates commonly receive only non-contact visits. Many inmates and visitors regard non-contact visiting as an unsatisfactory or unpleasant mode of visitation.

49. Physical conditions of visitation are the subject of numerous complaints. At Folsom, weekend, holiday, and evening visitation are not available to lockup inmates because the overtaxed facilities are allocated to general population inmates during these choicer time slots. Visitors often experience lengthy delays and unpleasant searches by prison staff prior to contact visits. Delays are also sometimes caused by a lack of sufficient guards to escort inmates to and from the visiting rooms. Scarcity of facilities

sometimes requires contact visits to be involuntarily abbreviated.

50. Visiting is an important penological tool, partly because it preserves community and family ties and gives inmates something to work for and look forward to following release from incarceration. Incidents of violence in the visiting room are rare, because inmates tend to be on their best behavior. However, the smuggling of contraband, particularly drugs, persists as a problem inherent in contact visits despite the thorough searches performed by correctional officials.

Q. Telephone Service

51. Lockup inmates have no access to telephones except in emergencies. Permitting lockup inmates some such access on a reasonable, monitored basis would pose little institutional security risk.

R. Legal Research Materials

52. Segregated inmates are not allowed inside law libraries at either prison. They may conduct legal research only by means of a "paging" system. To use this system, they must request books two or three at a time from the central libraries. Often such requests are overlooked or responses are delayed. Once obtained, books can be kept for only brief periods. This system greatly prolongs the time required to conduct elementary legal research even for an inmate with some formal legal training. For most, effective legal research under the present paging system is virtually impossible. No qualified legal assistants are available to help lockup inmates.

53. The prison libraries themselves are incomplete and overtaxed. Volumes are missing from most commonly-used sets, as are recent supplements to codes. Libraries at both prisons lack basic treatises and instructional texts. Demand for books in

the existing collection at San Quentin is so great that an unmanageable backlog of hold requests has accumulated. The library director stated that he will be forced henceforth to abolish the system of hold requests. Lockup inmates will instead be required to request desired books continuously until the books happen to be available. Lockup inmates have no way to learn of the return of volumes they seek.

S. Idleness

54. Lockup inmates at San Quentin and Folsom may not participate in organized "programs" such as vocational training, education, or hobbies. Except for a few tier tenders, they may not hold jobs. Communication with inmates in nearby cells is possible but difficult. Daily activities typically available to an inmate in segregation include watching television (if he has one), listening to radio or stereo, or reading whatever printed materials he can secure and store in his

cell.[26]/ Lockup inmates typically feel extreme boredom. Some find this boredom to be the worst aspect of life in segregation.

55. The overwhelming weight of testimony, including that of knowledgeable California prison officials, leaves no doubt that the long-term confinement of large numbers of inmates without work or other program is an unsound penological practice. The evidence established that many idle lockup prisoners suffer psychological pain and loneliness. Plaintiffs also established that prolonged idleness adversely affects the mental health of a number of inmates. The absence of program spawns tension and violence; it increases rather than decreases antisocial tendencies among inmates.

T. Health Care at Folsom[27]/

56. The medical staff at Folsom consists of five physicians, two psychiatrists and a psychologist. One of the physicians is Dr. R. Grant Jordan,

Chief Medical Officer at the prison. Dr. Jordan devotes about one-half of his time to administrative duties, and one-quarter to psychiatric treatment of inmates. At the time of trial, one of the remaining physician positions stood vacant following the incumbent's retirement under a cloud of extremely serious negligence charges. Dr. Jordan characterized the entire medical staff, responsible for the care of approximately 3,500 inmates, as "overtaxed." As a result, virtually all screening of inmate complains is performed by medical technical assistants, or "MTA's." MTA's conduct sick call in the lockup units daily; a physician passes by the cells only once each week. MTA's administer non-prescription drugs and, generally speaking, determine which inmates may be released from the cells for examination by a physician in the prison infirmary. However, lockup inmates will,

if they insist, be taken to see a doctor even if not recommended by an MTA.

57. In comparison with other parts of the prison, the Folsom infirmary is relatively clean. The evidence does not, for example, show any vermin infestation. But sanitation is not satisfactory from a medical point of view. For one specific example, the area in the infirmary designed for post-operative care is located next to a utility room with a mop sink. The infirmary surgical suite lacks aseptic ventilation adequate for major surgeries. Inmates requiring major emergency surgery are immediately transported to the University of California, Davis hospital in Sacramento, about one-half hour away. Inmates requiring major elective surgery must await transfer to the California Medical Facility at Vacaville, or to a hospital specializing in the particular procedure.[28/] A wait of approximately six months is normally required for a transfer

of his kind, although urgency of need is monitored. Inmates must also await transfer if they have a medical condition requiring special diet. The only special diet available at Folsom is one designed for treating ulcers. A substantial backlog of inmates awaits dental treatment at any given time.

58. Like the medical staff, the psychiatric staff is overburdened. Primary attention is devoted to the treatment of emergency cases, typically acute psychotics. Minimal individual and no group therapy is provided lockup inmates, even though such therapy is frequently among the principal recommendation of sentencing courts and parole boards. A very high percentage of lockup inmates suffer from significant psychiatric problems. Some of these receive no treatment.

59. Dr. Jordan believes, and the Court finds, that the quality of health

care at Folsom is less than adequate and could be improved in many ways. Additional staff are needed, including physicians, psychiatrists, nurses, and clerical workers. The last are needed to replace inmate workers who now have access to the medical records of other inmates, an undesirable practice. Less reliance should be placed on MTA's, and MTA's should have standing orders. Physician and psychiatrist performance would benefit from formal peer review, not presently conducted. However, the Court finds, based on the testimony of Dr. Jordan, that while there may be isolated exceptions, Folsom provides most strictly "necessary" treatment on a timely, medically sound basis.

U. Violence

60. Lockup units at San Quentin and Folsom are counted among the most violence-racked correctional facilities in the United States.[29/] In part, this is due to

the California Department of Corrections policy of concentrating the most violence-prone offenders in these institutions. In part, it is caused by the horrendous physical conditions, including double-celling. In part, it due to the crowding of both facilities beyond design capacity. In part, it may be due to the fact that lockup units have no programs. But in large measure, it originates in the violent propensities of the segregated inmates themselves.

61. Segregated inmates manufacture and secrete weapons with exceeding resourcefulness. Specially-trained security officers search lockup cells on a frequent, though random, basis, and confiscate numerous stabbing and clubbing implements. Lockup inmates are thoroughly searched on virtually every occasion they leave their cells. They are constantly monitored by guards heavily armed with both a shotgun and a rifle.30/ Despite all of

these precautions, assaults on inmates in lockup are common.

62. Violence among inmates is frequently channeled through social organizations. Prison authorities and many inmates term these organizations "gangs" and ascribe to them colorful names such as "Aryan Brotherhood," "Mexican Mafia," and "Black Guerrilla Family." Expert sociologists who testified at trial expressed the view that these groups are neither as stable nor as well-organized as prison officials believe. Alliances and enmities among inmates shift constantly. The institutional labeling of an inmate as a gang member frequently proves to be a self-fulfilling prophecy. Fellow prisoners tend to accept the label, forcing the inmate to ally himself with others similarly labeled in order to survive. Inmates seeking to identify themselves with a gang sometimes perform acts of violence in order to gain "membership." Factional

strife and leadership struggles within gangs occasion violence, as do battles between rival gangs.

63. Both inmate and staff bystanders have been wounded or killed by stray gunfire, an alarming commentary upon the wisdom of maintaining guns within the units. See supra note 30. On occasion, gunfire has been used unnecessarily. The evidence does not, however, establish that mistreatment or unjustified violence directed at inmates by correctional officers is in any way countenanced by defendants. While shocking incidents have occurred, they have been carefully investigated.31/

V. Overcrowding

64. Most of the Court's findings relative to crowding in lockup units have already been stated. The parties stipulated at trial that all California correctional facilities except one are seriously overcrowded. During the pendency

of this action, San Quentin has housed 3,800 inmates in its 2,712 cells, and Folsom has housed 850 more than its 2,058 design capacity. Such overcrowding strains all environmental systems within the institution, and makes it difficult to provide decent conditions of confinement to lockup inmates.

W. Standards Governing Placement in Segregation

65. For an inmate at San Quentin or Folsom, the consequences of assignment to segregation are harsh. The inmate is substantially deprived of human contact (unless double-celled). He spends days and nights without respite in a dim, noisy, malodorous cubical the size of a dog kennel. Probably this cubical is infested with vermin. Sometimes it is cold as well. The inmate is denied "privileges" such a family visits and telephone calls. He has no work or program.

66. Because lockup inmates cannot hold jobs or take part in other programs, they cannot earn the worktime sentence credit prescribed by Cal. Penal Code § 2933(a) (West's 1984 supp.). For inmates whose crimes were committed on or after January 1, 1983, this is the only form of sentence credit comparable to good time credit that may be earned. See Cal. Penal Code § 2931(d) (West's 1984 supp.).
For the remainder, the lack of program also adversely affects good time sentence credit earned. See id. § 2931(c). In addition, the inability to participate in a program commonly retards the parole dates set for lockup inmates by making it impossible for them to comply with parole board recommendations. Thus in the majority of cases, assignment to lockup significantly extends the total amount of time an inmate must spend in incarceration. The Court bases this finding not only upon a reading of applicable California law, but also upon

the specific testimony of present and former inmates who appeared at trial.32/

67. In 1976, the Court ruled that inmates at San Quentin and Folsom had been segregated for "administrative" reasons arbitrarily and without observance of procedures required by the due process clause of the Fourteenth Amendment.32/ Wright v. Enomoto, 462 F.Supp. 397, 400-04 (N.D.Cal. 1976). Accordingly, the Court ordered that inmates be provided with five procedural safeguards prior to assignment to segregation: (1) prompt written notice of the reasons for proposed segregation; (2) a fair hearing held no later than 72 hours after placement in segregation; (3) representation by a counsel-substitute when prison officials determine that the inmate is illiterate or the issues complex; (4) an opportunity to present witnesses and documentary evidence, unless prison officials determine in good faith that permitting such evidence would be unduly

hazardous to institutional safety or correctional goals; and (5) a written statement of reasons for any decision to segregate. Id. at 404-05.

68. The order in Wright v. Enomoto has not received full compliance. Many prisoners are still placed in segregation without timely notice or hearing. The notice often is not, as required by the Court's order (462 F.Supp. at 404), "in sufficient detail to enable the prisoner to prepare a response or defense." For example, one "notice" states in full: "You have been placed on Administrative Segregation Status pending investigation that your continued presence in the general population poses a threat to the safety and security of the institution." Hearings, too, tend to be perfunctory. As a consequence, significant numbers of inmates continue to be subjected to the privations of lockup arbitrarily and without evidence adequate to establish a reasonable belief

that the inmates present a danger to others or a threat to the security of the institution.[34/] See Wright v. Enomoto, 462 F.Supp. at 403. Frequently the decision to segregate is based on unverifiable hearsay or "confidential information" from a source of unproven reliability identifying the inmate as a gang member.[35/] The Program Administrator for a lockup unit at San Quentin admitted that gang membership determinations are generally reached prior to the classification hearing.

69. Equally disturbing is the fact that inmates, once assigned to lockup, are retained there for inordinately long periods without any renewed justification for continued segregated confinement. As of mid-August, 1983, 548 inmates had been held continuously in lockup for more than one year, and 249 had been so held for over two years. Many are retained there solely because the original belief that the inmate

is a "gang leader" has not be disproven. A vicious cycle emerges whereby the inmate, identified as a gang member, is assigned to exercise in the same yard with other reputed members of the gang, and through his association with these inmates the gang membership identification is perpetuated. According to prison officials, an inmate cannot "disprove" an established gang identification without the aid of other inmates or staff. Consequently inmates frequently lose all hope of securing release from lockup.

70. Moreover, even inmates cleared for return to the general population remain confined in lockup with its attendant prohibitions of work and denial of "privileges," for substantial periods due to lack of cell space in the rest of the prison. At the time of trial, approximately 169 such "holdover" inmates were confined in segregation at San Quentin alone.

X. Compliance With Court Orders

71. The record demonstrates that defendants have often failed to effect prompt and proper compliance with order of this Court. In addition to the Wright v. Enomoto order respecting placement in segregation, orders that have not been obeyed or that have been obeyed following excessive delay include those provisions of the preliminary injunction dealing with double-celling,[36] showers,[37] and exercise.[38] Correctional officers testified in court that they were unfamiliar with various provisions of the Court's orders during a contempt proceeding recently brought by plaintiffs. Defendants have yet to establish an adequate mechanism for ensuring compliance with the preliminary injunction and other Court orders. Greg Harding, the official charged by defendants with supervising compliance, testified that his authority is limited to developing plans to facilitate compliance,

and does not include any power to investigate alleged violations of the injunction. Further obstacles to effective compliance spring from the fact that defendant Wardens, while well-intentioned, frequently prove unaware of actual events transpiring within the lockup units of their institutions.

III. CONCLUSIONS OF LAW

A. Segregation Cells

The cells in which plaintiffs are housed range between 45.5 and 56 square feet. Plaintiffs note that this is considerably less space then the minimum recommended by standards of bodies such as the American Correctional Association. However, it is an error to "constitutionalize" such standards. Hoptowit v. Ray, 682 F.2d 1237, 1249 (9th Cir. 1982); Newman v. State of Alabama, 559 F.2d 283, 288 (5th Cir. 1977); see also Rhodes v. Chapman, 452 U.S. 337, 348 & n. 199.

13 (1981). Plainly, cells of the size involved here are less than ideal places in which to confine human beings on a round-the-clock basis. But the Court concludes that, if all other conditions are satisfactory, segregating inmates in the cells presently used for that purpose at San Quentin and Folsom is not inconsistent with minimum contemporary standards of decency. See Laaman v. Helgemoe, 437 F.Supp. 269, 310 (D.N.H. 1977). Consequently the use of such cells does not by itself constitute cruel and unusual punishment. See Rhodes, 452 U.S. at 346-47; Hoptowit, 682 F.2d at 1246.

The evidence established that in addition to the cells regularly used to confine lockup inmates, defendants also sometimes employ "quiet cells" with solid outside doors. The use of such cells with the doors closed constitutes cruel and unusual punishment that violates the Eighth Amendment. Hoptowit, 682 F.2d at 1257.

B. Double-Celling

In Rhodes v. Chapman, the Supreme Court held that the double-celled confinement of segregated inmates at the Southern Ohio Correctional Facility (SOCF) did not violate the Eighth Amendment. See 452 U.S. at 342 n. 3, 349 n. 15. Other courts have reached similar conclusions. E.g., Union County Jail Inmates v. Di Buono, 713 F.2d 984, 1001 (3rd Cir. 1983), cert. denied, 104 S.Ct. 1600 (1984); Ruiz v. Estelle, 679 F.2d 1115, 1151 (5th Cir. 1982); Capps v. Atiyeh, 559 F.Supp. 894, 907 (D.Ore. 1982). However, conditions under which lockup inmates are double-celled at San Quentin and Folsom differ markedly from those prevailing at SOCF when Rhodes was decided. The Supreme Court characterized SOCF as a "top-flight, first-class facility," and noted that "though small, the cells in SOCF are exceptionally modern and functional; they are heated and ventilated and have hot an

cold running water and a sanitary toilet." Rhodes, 452 U.S. at 341, 348, n. 13. San Quentin and Folsom are old prisons presenting the "deplorable" and "sordid" conditions the Supreme Court contrasted with those at SOCF. See id. at 352; see also Union County Jail Inmates, 713 F.2d at 1001 n. 30. In these prisons, unlike SOCF, double-celling increases violence among inmates and causes intolerable stress and psychiatric problems. Cf. Rhodes, 452 U.S. at 348. The constitutional significance of both distinctions was noted by the Ninth Circuit in affirming the double-celling provision of the preliminary injunction. Toussaint v. Yockey, 722 F.2d 1490, 1492-93 (9th Cir. 1984).

The Court concludes, based on the virtually unanimous testimony of witnesses at trial, that the double-celling of segregated inmates at San Quentin and Folsom under conditions now prevailing or likely to prevail in the foreseeable future

is cruel and inhuman, violating the Eighth Amendment.

C. Heating and Ventilation

It is clear that adequate heating and ventilation are fundamental attributes of "shelter," which is a basic Eighth Amendment concern. See Ramos v. Lamm, 639 F.2d 559, 566, 568 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); Martino v. Carey, 563 F.Supp. 984, 999 (D.Ore. 1983). An institution must therefore provide all inmates including segregated inmates, with "adequate" heat and ventilation. See Hoptowit, 682 F.2d at 1246; Wright v. Rushen, 642 F.2d 1129, 1132-33 (9th Cir. 1981); Newman, 559 F.2d at 286; see also Palmigiano v. Garrahy, 443 F.Supp. 956, 961, 979 (D.R.I. 1977), Aff'd, 616 F.2d 598 (1st Cir.), cert. denied, 449 U.S. 839 (1980). The evidence in this case established that, with the exception of a relative few inmates housed in the San Quentin Adjustment Center and Folsom

SHU I, plaintiffs are not provided with either adequate heat or ventilation. This condition violates the Eighth Amendment.

D. Plumbing

As an aspect of "sanitation," plumbing is a basic Eighth Amendment concern. See Ramos, 639 F.2d at 566, 568; Martino, 563 F.Supp. at 999. Consequently the plumbing in a facility used to house inmates, including segregated inmates, must be "adequate." See Hoptowit, 682 F.2d at 1246. The evidence established that the plumbing in most if not all of the units housing lockup inmates at San Quentin and Folsom is grossly inadequate. In fact, the leaking pipes and fixtures, clogged drains, rotting sewer lines, and other plumbing and sewage deficiencies are a major cause of the serious health hazards prevalent in lockup units of the two prisons. These conditions are inconsistent with human decency, and violate the Eighth Amendment.

E. Lighting

Lighting is an indispensable aspect of adequate shelter and is required by the Eighth Amendment. See Ramos, 639 F.2d at 568; Martino, 563 F.Supp. at 999. The physically and mentally debilitating effects of a lack of adequate lighting were noted in Palmigiano v. Garrahy, 443 F.Supp. at 961. The Court will not "constitutionalize" any particular expert standard. Rather in the context of this case, the Court concludes that each inmate must be afforded sufficient light to permit him to read comfortably while seated or lying on his bunk.40/ Many if not most lockup inmates are not furnished with this amount of light, in violation of the Eighth Amendment.

F. Noise

An obligation to furnish inmates a reasonably quiet living space does not, strictly speaking, fall within any of the categories of basic Eighth Amendment

concerns enumerated in Hoptowit, although it could well be regarded as a component of the obligation to provide adequate shelter. However, the facts of this case leave no doubt that the constant level of noise is among the most intolerable conditions now endured by lockup inmates confined in the five-tier cell blocks at both prisons. The level of noise is so extreme that it adversely affects their hearing and mental processes. Constant exposure to such a level of noise inflicts pain without penological justification. It also contributes to the creation of "a total environment where debilitation is inevitable, and which is unfit for human habitation and shocking to the conscience of a reasonably civilized person." Palmigiano, 443 F.Supp. at 979.

Noise is a troubling problem because much of it is caused by plaintiffs, collectively. However, courts have not hesitated to declare unconstitutional other

indecent prison conditions caused by inmates themselves. See, e.g., Hoptowit, 682 F.2d at 1250 (violence); Ramos, 639 F.2d at 572-73 (violence); Martino, 563 F.Supp. at 988-89, 991, 997, 999 & n. 7 (violation, sanitation); Palmigiano, 443 F.Supp. at 979. But cf. Holt v. Sarver, 309 F.Supp. 362, 378 (E.D.Ark. 1970) (conditions held to be of less concern when "due to the conduct of the inmates themselves"), aff'd, 422 F.2d 304 (8th Cir. 1971). The Court concludes that public conceptions of decency inherent in the Eighth Amendment require that plaintiffs be housed in an environment that if not quiet, is at least reasonably free of excess noise.41/ San Quentin Adjustment Center and SHU I at Folsom presently meet this standard. The five-tier cell blocks, including Folsom SHU II, do not.

G. Electrical Systems

As an aspect of "shelter," a prison's electrical system falls within the purview

of Eighth Amendment scrutiny. The denial of electricity to a segregated inmate's cell for a moderate period of time does not constitute cruel and unusual punishment. Electric wiring that presents a continuous danger of death or serious injury from fire or electrocution is another matter. See Ramos, 639 F.2d at 570. Such a danger is present in segregation units at both San Quentin and Folsom. This condition violates the Eighth Amendment.

H. Fire Safety

Safety from fire is an aspect of "shelter," and as such is properly an areas of Eighth Amendment concern. Consequently, a prison "unquestionably has a duty to provide adequate fire safety for its inmates." Ruiz, 679 F.2d at 1153; see Leeds v. Watson, 630 F.2d 674, 675-76 (9th Cir. 1980); Santana v. Collazo, 714 F.2d 1172, 1183 (1st Cir. 1983), cert. denied, 104 S.Ct. 2352 (1984). Lockup units at both prisons are replete with fire hazards.

Evacuation procedures are nonexistent or, at best, untested. Moreover, in contrast to Ruiz, see 679 F.2d at 1153, the record in this case shows that multiple fire-related fatalities have occurred. The fire safety in the lockup units involved in this case is so blatantly inadequate as to violate the Eight Amendment.

I. Earthquake Safety

Seismic safety is also an aspect of shelter. However, the Court is not persuaded that forcing prisoners to reside within a building hat is not earthquake-proof contravenes public notions of decency. Numerous Americans live and work within such buildings without any perception that their shelter is inadequate. The seismic hazards documented in this case do not violate the Eighth Amendment.

J. Clothing, Laundry and Bedding

Clothing is a basic area of Eighth Amendment concern. Hoptowit, 682 F.2d at

1246; Wright v. Rushen, 642 F.2d at 1132-33; Newman, 559 F.2d at 286. Prisoners in lockup at San Quentin and Folsom are permitted only state-issued clothing and a limited quantity of approved private clothing. See 15 Cal. Admin. Code § 3032 (1983). Defendants are under an obligation to ensure that this clothing is adequate and that it is adequately laundered on a regular basis. Toussaint v. Rushen, 553 F.Supp. 1365, 1379 (N.D.Cal. 1983), aff'd in relevant part, 722 F.2d 1490 (9th Cir. 1984). When laundry exchange is provided in accordance with defendant's internal policies, it is adequate. But at San Quentin, laundry exchange is not so provided. Weeks and months pass without affording lockup inmates an opportunity for clothing exchange. This violates standards of decency inherent in the Eighth Amendment.

Reasonably clean, sanitary bedding is likewise required by the Eighth Amendment.

See Ramos, 639 F.2d at 570; Toussaint v. Rushen, 553 F.Supp. at 1379. The bedding issued to lockup inmates is frequently filthy and unsanitary. This conditions is indecent, and violates the Eighth Amendment. Decency also requires that each cell be furnished with a clean, untorn pillow. Many lockup cells are not furnished. This, too, violates the Eighth Amendment.

K. Personal Hygiene

The fundamental requisites of sound personal hygiene are not directly listed among the Eighth Amendment concerns enumerated in Hoptowit, Wright v. Rushen, and Newman. However, the subject bears a clear relation to three such areas: shelter, sanitation, and medical care. See Martino, 563 F.Supp. at 999 ("[t]he provision of adequate means of hygiene, and the sanitary disposal of bodily wastes so that the wastes do not contaminate the cells, are constitutionally required.").

Many lockup inmates at San Quentin have no hot water in their cells and are permitted indoor showers as rarely as once per week. Some regular access to a personal cleaning facility is critical for inmates such as these, living amidst the conditions of filth that prevail in lockup units of both prisons. The Court concludes that minimum standards of decency require that lockup inmates without hot running water in their cells be accorded showers three time per week in facilities reasonably free of standing water, fungus, mold and mildew.[42/] See 15 Cal. Admin. Code § 3343(f) (1983) (evidence that this represents standard of decency). As this requirement is not presently met, conditions of personal hygiene violate the Eighth Amendment.

L. General Sanitation

A sanitary environment is a basic human need that a penal institution must provide for all inmates. See Hoptowit, 682 F.2d at 1246. Defendants do not dispute

the fact that lockup units at San Quentin and Folsom are unsanitary. Rather, they argue that plaintiffs have not established that unsanitary conditions have made a substantial detrimental impact on their health. The Court cannot accept this defense. The evidence at trial of cells without solid waste containers, service areas stinking of raw sewage and human feces and tiers encrusted with rotting garbage, amply establishes that conditions of sanitation in the lockup units involved in this case are inconsistent with any standard of decency and present a serious hazard to the health of each plaintiff. See Ramos, 639 F.2d at 570; Martino, 563 F.Supp. at 1000. Such conditions violate the Eighth Amendment.

M. Pests

Active infestation of vermin such as rats, mice, birds, and cockroaches is inconsistent with the adequate sanitation required by the Eighth Amendment. At least

some lockup units of each prison are plagued by each of these. Such infestations are part and parcel of the general lack of adequate sanitation in the prisons, particularly the five-tier cell blocks. The failure of defendants to provide a reasonably pest-free environment for lockup inmates violates the Constitution.[43/]

N. Food

Adequate food is a basic Eighth Amendment requirement. Hoptowit, 682 F.2d at 1246; Wright v. Rushen, 642 F.2d at 1132-33; Newman, 559 F.Supp. at 286. The food served to inmates is deficient under constitutional standards, even when nutritionally complete, if it is prepared under conditions so unsanitary as to make it unwholesome and a threat to the health of inmates who consume it. E.g., Ramos, 639 F.2d at 570-72 (holding food condition constitutionally impermissible even though no specific instance of inmate sickness

cited); see also Leeds, 630 F.2d at 676; Palmigiano, 443 F.Supp. at 962-63, 987; Laaman v. Helgemoe, 437 F.Supp. at 309. The facts established in this case pertaining to conditions of food preparation and delivery are like those held to violate the Constitution in Ramos. As noted above, the kitchen operation at San Quentin has already been declared unconstitutional in a state court action, and the kitchen at Folsom is, if anything, worse. The Court concludes that the provision to lockup inmates of food stored, prepared, and served under the unsanitary and unhealthful conditions now prevailing violates the Eighth Amendment.

O. Exercise

As mentioned at the outset, exercise is solidly established as a constitutional requirement for all prison inmates. See Ruiz, 679 F.2d at 1152. The Ninth Circuit has ruled that inmates who were members of the plaintiff class in this case, housed in

segregation at San Quentin Adjustment Center for a period of five years, must be accorded outdoor exercise one hour per day, five days per week, weather and prison exigencies permitting. Spain v. Procunier, 600 F.2d 189, 199 (9th Cir. 1979). On the other hand, a short-term denial of exercise to an inmate for disciplinary or security reasons probably does not violate the Eighth Amendment. See Hayward v. Procunier, 629 F.2d 599, 603 (9th Cir. 1980), cert. denied, 451 U.S. 937 (1981); Spain, 600 F.2d at 200; Martino, 563 F.Supp. at 1000-01. The inquiry concerning the constitutional adequacy of exercise must proceed from the individual facts of each case. Toussaint v. Yockey, 722 F.2d at 1493. If plaintiffs were free to exercise or even walk about indoors for any significant period of time each day, outdoor exercise might not be required. Cf. Clay v. Miller, 626 F.2d 345, 347 (4th Cir. 1980). However, plaintiffs have no

such opportunity, but are confined within cells of less than 50 square feet virtually 24 hours per day. A substantial percentage are so confined for months or years. As the Ninth Circuit noted in affirming the preliminary injunction, these circumstances are similar to those present in Spain. Toussaint v. Yockey, 722 F.2d at 1493. The Court concludes that under circumstances of lockup at San Quentin and Folsom, each inmate must be provided with at least that degree of exercise required by the preliminary injunction, but that exercise may be suspended in the case of any inmate for a period not exceeding ten days for genuine reasons of discipline, inmate safety or prison security. Also, the Court concludes that decent "meaningful exercise" requires that when weather is inclement during a period of outdoor exercise, the exercising inmates be issued suitable rain gear.

P. Visitation

Visits, particularly contact visits, are undoubtedly important to effective penological administration. Contact visits give inmates something to look forward to, and promote and preserve social ties critical for any hope of successful reentry into the free world. However, contact visits also entail serious security risks. The record amply establishes that contact visits at both San Quentin and Folsom are often used by inmates to smuggle drugs, weapons and other contraband into the institution. For precisely this reason, the Supreme Court has concluded that the denial of all contact visits to pretrial detainees held for over 30 days does not violate the due process clause of the Fourteenth Amendment. Block v. Rutherford, 104 S.Ct. 3227, 3232-34 (1984). Eighth Amendment principles do not require a contrary result in this case involving convicted prisoners. See Ramos, 639 F.2d

at 578-81; Newman, 559 F.2d at 291; see also Union County Jail Inmates, 713 F.2d at 998 (conditions permissible for pretrial detainees under due process clause a fortiori permissible for convicted prisoners under Eighth Amendment). The visiting restrictions applied to segregated inmates by defendants, which deprive none of all visits and accord most contact visits, are not "so totally without penological justification" that they violate the Eighth Amendment.[44/] See Rhodes, 452 U.S. at 364; Gregg v. Georgia, 428 U.S> 153, 183 (1976) (plurality opinion).

Q. Telephone Service

Plaintiffs cite no authority for the assertion that the complete denial to inmates of access to telephones violates contemporary standards of decency inherent in the Eighth Amendment. The Court cannot conclude that such a denial of access is

indecent, or that it violates the Constitution.

R. Legal Research Materials

Unlike plaintiffs' other claims, the claim respecting access to legal research materials is founded on the requirements of due process, not the Eighth Amendment. These requirements are quite specific: Prison authorities must assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with either access to adequate law libraries or adequate assistance from persons trained in the law. Bounds v. Smith, 430 U.S. 817, 828 (1977). Bounds and other cases condemn prison and jail systems that deny classes of inmates the required access. E.g., id. at 818-21; Leeds, 630 F.2d at 676-77; Ruiz, 679 F.2d at 1153-55; Ramos, 639 F.2d at 582-85; Wolfish, 573 F.2d at 133 (reversed on other grounds); Martino, 563 F.Supp. at 1003-04.

Due process requires, in this respect, that the libraries available to inmates be "adequate" and that regulations governing inmate use of the library permit the meaningful use of the library. See Ramos, 639 F.2d at 583-85; Martino, 563 F.Supp. at 1003. The evidence in this case is not sufficient to permit the Court to conclude that the law library at either prison is presently inadequate. However, the current system of "paging" books is constitutionally deficient. See Martino, 563 F.Supp. at 1003; see also Williams v. Leeke, 584 F.2d 1336, 1338-39 (4th Cir. 1978), cert. denied, 442 U.S. 911 (1979). Even an individual highly trained in the law would be unable to secure meaningful access to the courts through such a system. See Ramos, 639 F.2d at 585.

S. Idleness

The wisdom of defendants' present policy of confining all inmates in their cells around the clock, with no program or

organized activity of any kind to occupy their time and attention, is dubious. Such confinement likely increases overall tension and promotes the very antisocial tendencies that segregation is supposed to control. Inmates without programs become ever less likely to succeed in becoming functional members of society, and ever more likely to follow a lifelong cycle of release, crime, and reimprisonment. As the Court has found, lockup confinement without program produces extreme boredom, a form of psychological pain. However, the Court's function is not to sit in judgment of the policy choices of state officials. See Bell v. Wolfish, 441 U.S. 520, 562 (1979). The Court must rather follow the recent admonition of the Ninth Circuit that programs for segregated inmates "simply are not constitutionally required." Hoptowit, 682 F.2d at 1258; see also Newman, 559 F.2d at 291.

Highly relevant to this conclusion is that in this case, the denial of programs to plaintiffs is not "totally without penological justification." At least in theory, each plaintiff has been selected for segregation on the basis of criteria indicating the he is in some way unfit or unsuited for intermingling with other inmates, whether because he has misbehaved, because he presents a threat to the safety of other inmates, or because he has requested isolation for other inmates for his own protection.[45/] Thus, the Court's conclusion as to the constitutionality of confinement without programs might be different if the entire inmate population of an institution were denied any work, recreation, education, or vocational training. Cf. Laaman, 437 F.Supp. at 317-18; Barnes v. Government of the Virgin Islands, 415 F.Supp. 1218, 1226 (D.V.I. 1976).

T. Health Care at Folsom

The standard of decency governing the Medical care a penal institution must provide to its inmates was defined by the Supreme Court in Estelle v. Gamble, 429 U.S. 97, 106 (1976). The Eighth Amendment prohibits "deliberate indifference to serious medical needs" of prisoners. See Hoptowit, 682 F.2d at 1253; Ruiz, 679 F.2d at 1149. The infirmary at Folsom and the medical services provided lockup inmates at Folsom are perhaps inadequate from a strictly medical point of view, as Dr. Jordan, the Chief Medical Officer, testified. The doctor-patient ratio is less than experts recommend; however, it is error to "constitutionalize" such standards. Ruiz, 679 F.2d at 1150; see Laaman, 437 F.Supp. at 312. The health care delivered at Folsom, while properly subject to criticism, is not as bad as that found to embody systemic "deliberate indifference" to inmate needs in other

cases. Cf. Hoptowit, 682 F.2d at 1252 (prison lacked full-time chief medical officer, sick call was not conducted daily, and guards held discretion concerning whether inmates received treatment by physician); Ramos, 639 F.2d at 575-78 (less than 10 hours per week of on-site primary physician coverage, and no on-site psychiatrist or psychologist provided); Capps v. Atiyeh, 559 F.Supp. 894, 911 (D.Ore. 1982) (record contained numerous instances of misdiagnosis or delayed diagnosis resulting in needless pain and injury); Martino, 563 F.Supp. at 989-91 (jail had no regular physician; all medical care supervised by nurse who attempted to diagnose inmate complaints).

The medical care provided lockup inmates at Folsom falls very near the constitutional borderline. Giving prison officials the benefit of the doubt, the Court concludes that the system of health care delivery at Folsom does not manifest

"deliberate indifference to serious medical needs" of the inmates. See Hoptowit, 682 F.2d at 1253 (defining "deliberate indifference" in this context).

U. Violence

Prison officials have a duty to protect inmates from constant threats of violence at the hands of other inmates and staff. Hoptowit, 682 F.2d at 1250; Ramos, 639 F.2d at 572. This duty is violated if officials are "deliberately indifferent to the safety needs" of the inmates. Id. Thus, courts must enjoin aspects of jail and prison operations that unduly jeopardize inmate safety. Courts must also enjoin conditions of confinement that are directly and indisputably linked to continual fear and violence, such as the double-celling involved in this case.

Citing Hoptowit, plaintiffs suggest that the Court should infer the existence of deliberate indifference to inmate safety from the extraordinarily high levels of

violence in lockup units at San Quentin and Folsom. See 682 F.2d at 1250. To establish a constitutional violation, however, it must be shown that in the face of such levels of violence, prison official have failed to undertake reasonable to protect the inmates. See Doe v. District of Columbia, 701 F.2d 948, 961 (D.C. Cir. 1983) (concurring statement of Edwards, J.). One example of such a violation is the failure to provide adequate guards. E.g., Hoptowit, 682 F.2d at 1250; Ramos, 639 F.2d at 573; Martino, 563 F.Supp. at 988; Holt, 309 F.Supp. at 997. Another is the failure to make any attempt to separate hardened, violent inmates from younger, vulnerable ones. E.g., Wright v. Rushen, 642 F.2d at 1134, n. 3; Martino, 563 F.Supp. at 997. Still another is the use of physical facilities that do not enable authorities to detect or prevent violence. E.g., Ramos, 639 F.2d at 573; Martino, 563 F.Supp. at 988. Of course, guard brutality

is not tolerated. E.g., Hoptowit, 682 F.2d at 1249-50.

This case involves no claim that any of these violations of the duty to prevent violence have occurred. To the contrary, plaintiffs attack practices, such as the maintenance of armed guards within the lockup units and the continuous confinement of segregated inmates, that are clearly intended to deter and prevent violence.[46/] It is possible that as various witnesses testified, many or all of the challenged practices are in the long term counterproductive. Again, however, it is not the Court's function to judge the relative wisdom of defendants' policies. Defendants' challenged practices do not manifest "indifference," nor are they so plainly misguided as to be "totally without penological justification." They are not unconstitutional.

V. Overcrowding

Overcrowding per se is not unconstitutional, although the conditions resulting from overcrowding may be. Fischer v. Winter, 564 F.Supp. 281, 298 (N.D.Cal. 1983). Plaintiffs ask the Court to rule that the overcrowding in the entire California prison system is unconstitutional because it the root cause of the evils identified herein. The Court will not so rule. If all of the above-discussed conditions violating the Eighth Amendment are punctiliously remedied, and no new violations permitted to arise, then conditions will be decent and segregation at San Quentin and Folsom will not longer constitute cruel and unusual punishment as it does now. The state of affairs in the remainder of the California prison system is not before the Court.

W. Standards Governing Placement in Segregation

If any facet of this case is more shocking than the physical conditions to which plaintiffs are subjected, it is the absolute capriciousness with which inmates are selected to suffer the grievous fate of assignment to segregation. Eight years ago, the Court entered an injunction designed to relieve the due process concerns raised by such arbitrary assignments. Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976), aff'd, 434 U.S. 1052 (1978). This order proved insufficient to end arbitrariness, partly because it did not receive full compliance. The Court therefore ordered further injunctive relief. Toussaint v. Rushen, 553 F.Supp. 1365, 1386-87 (N.D.Cal. 1983), aff'd in relevant part, 722 F.2d 1490 (9th Cir. 1984). While affirming this grant of further relief, entered as part of a preliminary injunction, the Ninth Circuit noted that intervening decisions call into question whether defendants' arbitrary

practices violate either the cruel and unusual punishment clause of the Eighth Amendment or the due process clause of the Fourteenth Amendment. Toussaint v. Yockey. 722 F.2d at 1494, n. 6. While expressing no doubt as to the controlling force of Wright v. Enomoto as the law of the case the footnote suggested that this Court should reconsider whether any further relief is warranted.

The Court, upon such consideration, concludes that further injunctive relief must be entered for three separate reasons.

First, relief is needed to ensure that prisoners are not deprived of a liberty interest without due process of law. The Supreme Court in Hewitt v. Helms, 103 S.St. 864 (1983), held that although there is no federally protected liberty interest in freedom from the strictures of administrative segregation standing alone, id. at 869-70, such a liberty interest can arise from the mandatory language of a

state statute or regulation, id. at 871. For purposes of this case, the relevant statutes creating a liberty interest in freedom from assignment to segregation are the California worktime laws, Cal. Penal Code §§ 2931, 2932, and 2933.[47] Set forth at length in the margin, these laws require that each California inmate "shall" be afforded an opportunity to earn a reduction in time served by participating in qualifying work, training, or educational programs, unless the inmate has committed specific misconduct amounting to at least a "serious disciplinary infraction" or, in "unusual case," where the "the Director of Corrections finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of harm to staff or other inmates."[48] Cal. Penal Code §§ 2931(c), 2933(b), 2932(a) (West's 1984 supp.). Moreover, for some inmates, these worktime credits constitute the only good time

credit that can be received. See id. § 2933(a) (quoted in margin).

As the Court has found, the assignment of inmates to segregation at San Quentin and Folsom, as it is presently administered, deprives them of any opportunity to earn credit for work or participation in a program, and thereby deprives them of the right to earn credit. However, the mandatory "shall" language of section 2932(a) creates an expectation protected by the due process clause of the Fourteenth Amendment that this deprivation will not be imposed absent satisfactory proof of one of the grounds listed in that section.[49/] In this respect, the case is similar to Wolff v. McDonnell, 418 U.S. 539, 555-59 (1976), in which the Supreme Court found that Nebraska statutes and regulations created a protected liberty interest in freedom from arbitrary deprivation of good time credit. In the context of that case, the Court concluded

that "[s]ince prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." Id. at 558.

This case is unlike both Meachum v. Fano, 427 U.S. 215 (1976), and Montanye v. Haymes, 427 U.S. 236 (1976), neither of which involved any state-created expectation amounting to a liberty interest.[50/] Meachum, 427 U.S. at 226; Montanye, 427 U.S. at 243. Also unlike in Meachum, Montanye and Hewitt, assignment to programless lockup at San Quentin or Folsom increases the length of time the inmate is required to spend in custody. Cf. Meachum, 427 U.S. at 222; Montanye, 427 U.S. at 238; Hewitt, 103 S.Ct. at 870. While not a prerequisite to the existence of a liberty interest, see Hewitt, 103 S.Ct. at 870-71,

this factor assumes importance here because it augments the quantum of "process" that is due. See id. at 872; compare Wolff, 418 U.S. at 564-72 (procedures required where length of time in custody is affected) with Hewitt, 103 S.Ct. at 872-74 (procedures required where length of time is not affected).

The second basis for entering further injunctive relief concerning placement of plaintiffs in segregation is that the conditions of such segregation, as the Court concludes above, violate the Eighth Amendment. As a general rule, even an indeterminate assignment to punitive isolation does not constitute cruel and unusual punishment, and a court is not warranted in imposing limits on such assignments. Toussaint v. Yockey, 722 F.2d at 1494, n. 6; see Gibson v. Lynch, 652 F.2d 348, 352-53 (3rd Cir. 1981). When the conditions of confinement in segregation violate the Eighth Amendment, however,

assignment to segregation subjects an inmate to a form of cruel and unusual punishment. The Supreme Court has specifically held that a court may regulate the length of time an inmate can be required to spend confined in segregation in the midst of indecent, unconstitutional conditions. Hutto v. Finney, 437 U.S. 678, 685-87 (1978). Logically, the same considerations permit a court to regulate initial placement in segregation amidst such conditions as well. See Hewitt, 103 S.Ct. at 876, n. 3 (opinion of Blackmun, J.).

In this case, the basic reason why the Court will allow defendants to continue operating the existing segregation units, rather than ordering transfer of all inmates out of those units until all constitutional violations are remedied, is that prison security would be unduly jeopardized by the latter remedy. See Part IV, infra. For so long as lockup

conditions continue to violate the Eighth Amendment, the Court must scrutinize the reasons justifying placement and retention of each inmate in segregation to ensure that they correspond to legitimate security considerations.

The third and final ground for entry of further relief concerning standards governing assignment to segregation is that the Court's prior order in Wright v. Enomoto has been consistently overlooked or disobeyed. The Court's power to grant further relief to effectuate the prior order is well established. Toussaint v. Yockey, 722 F.2d at 1494 (upholding this Court's order requiring periodic review of reasons for retention in segregation); see Hoptowit, 682 F.2d at 1247; Ruiz, 679 F.2d at 1155; see also Hutto, 437 U.S. at 687.

X. Compliance With Court Orders

Evidence at trial established that numerous provisions of the preliminary injunction and other orders entered by the

Court in this case have been disregarded by defendants and their employees. The record of compliance is spotty at best. Still more disturbing, the evidence revealed that cruel and unusual punishments such as the use of "quiet cells" are sometimes inflicted without defendants' knowledged or permission. The Court expects that each and every provision of the permanent injunction to be entered will be scrupulously observed. However, the history of noncompliance compiled by defendants over the ten-year course of this litigation must guide the Court in shaping a remedial decree.

The record of noncompliance constitutes an "exceptional condition" requiring the appointment of a Special Master pursuant to Fed. R. Civ. P. 53(a) to monitor compliance with the permanent injunction. See Ruiz, 679 F.2d at 1160-61; Gary W. v. State of Louisiana, 601 F.2d 240, 245 (5th Cir. 1979); Newman, 559

F.Supp. at 290; Gautreaux v. Chicago Housing Authority, 384 F.Supp. 37 (N.D.Ill. 1974). The appointment of a monitor is also required by the complex nature of the litigation and of the measures defendants must undertake to effect prompt compliance with constitutional standards required by the injunction today ordered. See Hoptowit, 682 F.2d at 1263; Ruiz, 679 F.2d at 1160 & n. 238. Courts have not hesitated to appoint a monitor or other similar officer when required to secure effective relief for unconstitutional jail or prison conditions. E.g., McMurry v. Phelps, 533 F.Supp. 742, 774 (W.D.La 1982); Powell v. Ward, 487 F.Supp. 742, 774 (S.D.N.Y. 1980) (special master appointed to oversee and report on compliance with order governing placement in segregation where defendants exhibited lack of concern for state of compliance with prior order), modified in part on other grounds, 643 F.2d 924 (2nd Cir.). cert. denied, 454 U.S. 832

(1981); Jones v. Wittenberg, 73 F.R.D. 82, 85 (N.D.Ohio 1976); Pugh v. Locke, 406 F.Supp. 3128, 331-32 (M.D.Ala. 1976), modified sub nom. Newman v. State of Alabama, 559 F.2d 283 (5th Cir. 1977); Miller v. Carson, 401 F.Supp. 835, 841 (M.D.Fla. 1975), modified, 563 F.2d 741 (5th Cir. 1977).

Accordingly, the Court will appoint a monitor as Special Master to report to the Court from time to time concerning the state of compliance with the permanent injunction. The monitor shall serve only until such time as it is clear that defendants have put an end to the violations of constitutional rights prohibited by the injunction. Compensation of the Master will be fixed by the Court and paid by defendants as part of the costs of this litigation. Fed. R. Civ. P. 53(a); seek Newman, 559 F.2d at 290; Valentine v. Englehardt, 474 F.Supp. 294, 304 (D.N.J. 1979).

IV. RELIEF

The proper remedy for conditions of confinement violating the Eighth Amendment is an order enjoining further confinement under such conditions. See, e.g., Hutto v. Finney, 437 U.S. 678, 685-88 (1978); Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir. 1982); Ruiz v. Estelle 679 F.2d 1115, 1144-45 (5th Cir. 1982); Ramos v. Lamm, 638 F.2d 559, 586 (10th Cir. 1980). In framing its order, the court must consider the cost of compliance and the effects of the relief upon prison security. Hoptowit, 682 F.2d at 1247; Wright v. Rushen, 642 F.2d at 1134. Generally speaking, these considerations preclude a court from ordering immediate closure of a facility violating Eighth Amendment standards, which would certainly be the fastest and most effective means of eradicating the constitutional violation itself. See, e.g., Ramos, 639 F.2d at 585-86. Instead, the remedial order must address only the

specific conditions that violate the Constitution, and only to the extent required to correct the specific violations.[51] Hoptowit, 682 F.2d at 1247; see Wright v. Rushen, 642 F.2d at 1133-34. If the state has undertaken bona fide steps to alleviate poor prison conditions, courts should defer to the policy choices the state has made when shaping its remedy.[52] Hoptowit, 682 F.2d at 1247.

In formulating a permanent injunction to enter in this case, the Court has considered all of these admonitions.

The permanent injunction to be entered will require substantial and immediate expenditures by defendants. However, cost cannot, stand i the way of eliminating conditions that violate the Eighth Amendment. Wright v. Rushen, 642 F.2d at 1134; Spain v. Procunier, 600 F.2d 189, 200 (9th Cir. 1979); Ahrens v. Thomas, 434 F.Supp. 873, 898 (W.D.Mo. 1977), modified, 570 F.2d 286 (8th Cir. 1978). Rather, cost

considerations govern only the selection among alternative remedial options. See Wright v. Rushen, 642 F.2d at 1134. The court has deferred to such concerns by requiring the preliminary injunction only, in most instances, that conditions be brought within constitutional requirements. Where specific remedial actions are ordered, it is because the evidence sufficiently establishes such actions to be the only feasible and satisfactory means of curing the deficiencies in question.

The Court has framed the permanent injunction wit full awareness that many of the inmates affected are among the most dangerous, violent men in the State of California. Plainly, defendants are reasonable in maintaining that there is a need to keep some of these prisoners from mingling with the general prison population. Consequently, upon a showing that one of several criteria relating to concerns of inmate safety or prison

security is met, the injunction will permit the segregated housing of an inmate during the interim period in which unconstitutional conditions of confinement have not yet been completely eliminated., The injunction will also allow the assignment, during the interim period, of an inmate to a reasonable term of segregation for punitive reasons, if defendants satisfactorily show that the inmate has been guilty of serious misbehavior.

The Court is satisfied that no relief provided in the permanent injunction is incompatible with legitimate security concerns. As an added safeguard, however, the injunction permits the Director of the California Department of Corrections, or the Warden of either prison, temporarily to suspend compliance during a state of genuine emergency. See Hoptowit, 682 F.2d at 1259; Hayward v. Procunier, 629 F.2d 599, 603 (9th Cir. 1980).

The foregoing constitute the Findings of Fact and Conclusions of Law upon which the Judgment of Permanent Injunction has this day been rendered.

Dated: October 18, 1984

STANLEY A. WEIGEL
Senior Judge

FOOTNOTES

1. Plaintiffs are a class, certified February 25, 1976, comprising all prisoners confined in or subject to confinement in administrative segregation in four California state prisons--in addition to San Quentin and Folsom, Deuel Vocational Institute at Tracy ("DVI-Tracy"), and the Correctional Training Facility at Soledad ("Soledad"). See Toussaint v. Rushen, 533 F.Supp. 1365, 1367 & n. 1 (N.D.Cal. 1983) (defining term "administrative segregation"). Defendants are the Director of the California Department of Corrections and the wardens and superintendents of the above-listed institutions. This decision applies only to conditions at San Quentin and Folsom, which were the subject of a trial before the Court beginning November 7, 1983, and ending January 11, 1984. The second phase of trial, pertaining to conditions at DVI-Tracy and Soledad, is presently scheduled to commence in

November, 1984. Segregated units at these two prisons will continue to be subject to the preliminary injunction entered January 14, 1983.

2. See Wright v. Enomoto, 462 F.Supp. 397, 399, 404 (N.D.Cal. 1976), aff'd, 434 U.S. 1052 (1978); Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983).

3. Such indicia include, for example, history, the provisions of law enacted by state legislature, expert opinions and professional standards. See, e.g., Rhodes, 452 U.S. at 346-47; Estelle v. Gamble, 429 U.S. 97, 103-04 & n. 8 (1976); Toussaint v. Yockey, 722 F.2d at 1495.

4. As of April 6, 1982, at least 1000 segregated inmates were housed in five-tier cell blocks at San Quentin. See Exhibit 56. About 64 were housed in another unit, the Adjustment Center. Likewise, at Folsom the great majority of segregated inmates are housed in the five-tier SHU II.

5. The official definition of plaintiffs' class is set forth in the Order Determining that Action is Maintainable as a Class Action, entered February 25, 1976. Plaintiffs include all inmates housed in "any of the maximum security, minimum privilege, segregated housing units in San Quentin Prison, Folsom Prison, the Correctional Training Facility ('Soledad'), and the Deuel Vocational Institute ('DVI')." The most significant aspect of this definition is the term "segregated housing." The meaning of this concept is discussed in the text below.

6. See generally 15 Cal. Admin. Code § 3375(b)(1981).

7. As a result of the preliminary injunction entered by this Court on January 14, 1983, there is now no double-celling in segregated units of either prison. However, the record contains ample evidence, including the testimony of inmates formerly double-celled in lockup,

to enable the Court to make findings concerning the character and effects of the practice.

8. In response to this Court's preliminary injunction, some efforts have been undertaken to prevent and repair broken windows at both prisons. Again, the record contains ample evidence to support a finding that in the absence of the court order, large numbers of broken windows have been left unrepaired by prison officials for lengthy periods. Moreover, some windows have not been repaired promptly even since the entry of the injunction.

Many of the broken windows are caused by inmate misbehavior. Some are caused by gunfire in the units.

9. Defendants did not introduce any test results to contradict or dispute this data.

10. Cross-connections between the fresh water and waste water systems are not fitted with vacuum breakers, creating a

risk that waste water could contaminate the fresh water supply.

11. In addition to problems of malfunction, the evidence shows that the plumbing fixtures can also cause problems by breaking. One inmate testified that he suffered extensive cuts requiring hospitalization when his toilet broke while he was sitting on it. When assigned to another cell following his return from the hospital, he immediate tested the toilet. It also broke.

12. Standing water also cases operational problems. An inmate testified that his San Quentin East Block tier was left without heat when a tier officer was unable to switch on the heating system due to three feet of water standing in the basement.

13. Robert Dacy, a former Folsom SHU II lockup inmate, testified that his cell was equipped with a 40 or 60 watt bulb. Defendants presented no evidence to suggest

that other cells differ. A report introduced by plaintiffs as Exhibit 56 states that cells are generally equipped with a 75 or 100 watt bulb at San Quentin.

14. Some inmates use homemade shades made of materials such as cardboard to dim their lights. They do this from a desire to obtain privacy or to sleep.

15. The maximum noise levels permitted by ACA standards are 70 dBa in the daytime and 45 dBa at night. It should be noted in this regard that the uncontradicted test results showed, in addition to the average levels mentioned in the test, peaks as high as the mid to upper 80's during the day and the low 70's at night.

16. These include self-contained breathing apparatus (Folsom) and built-in firepipe stands (San Quentin).

17. Inmates also receive a prison-issue blue denim jacket that is apparently not subject to exchange for laundering.

18. A standard "essential" for ACA accreditation of a prison is that inmates must receive an exchange of clothing at least three times weekly and a clean towel daily.

19. The adequacy of this opportunity was not established. The record does not, for example, show whether any hot water is available for such showers. The evidence at trial indicates that inmates are not permitted to bring items such as towels with them into the exercise yards where the outdoor showers are located. Not all San Quentin exercise yards are equipped with showers.

20. In-cell "hot and cold running water" is an "essential" ACA standard for prison accreditation.

21. One inmate testified that he was forced to erect a cardboard barrier across the front of his cell to prevent rats from entering.

22. An "infestation" in this context refers to both the presence and the growth and reproduction of a species of organism in a given environment. Mere presence by itself is referred to as "activity."

23. Use of the term "yard" to describe the exercise areas is a euphemism. The areas allocated to lockup inmates are quite small, generally only slightly larger than a half basketball court. They are paved and surrounded by a chain link cage fence. Facilities are minimal.

24. The inmates conceded to be receiving less than the required exercise are those in San Quentin East Block and C and D Sections of South Block.

25. Evidence indicated at San Quentin is one of very few maximum security prisons in the nation to allow conjugal visiting for any of its inmates.

26. Writing, though theoretically possible, is in practice very difficult because of poor lighting, lack of any

adequate writing surface within the cells, noise, etc.

27. The constitutionality of health care provided to lockup inmates at San Quentin is not at issue in this case. That issue is among those presently pending in Marin v. Rushen, No. C-80-0012 MHP (N.D.Cal.).

28. Dr. Jordan defined "elective" surgeries as those needed to remedy conditions that are not life-threatening and do not produce major discomfort. Examples he have were hernias and gallstones. Dr. Jordan stated that "elective" conditions are sometimes quite serious.

29. Despite alarming overall levels of violence, the record contains no evidence that sexual assault is a particular problem in lockup except in instances where segregated inmates are double-celled.

30. The Court heard convincing testimony that the constant use of firearms to cover inmates inside housing units is very rarely encountered in prisons outside California. Credible evidence also tended to show that the continuous presence of armed guards aggravates rather than mitigates the violent tendencies of inmates so confined. On the other hand, evidence also indicated that given the extremely violent tendencies of the present lockup population, removal of guns from the units would entail at least some element of risk.

31. One such incident took place on August 18, 1983, when a shotgun blast fired by a guard at close range permanently blinded inmate Anthony Martinez. In that instance, prison authorities, acting on a tip, conducted an investigation that uncovered the falsity of the explanation given by the guard for the shooting. The record does not show the nature of any disciplinary action taken, but reveals that

the incident was referred to civil authorities for prosecution.

32. Kenneth Raines, 25, first arrived at San Quentin February 14, 1983, to begin serving a sentence for grand theft. He was immediately placed on "administrative segregation" for orientation. As he was not a Level IV inmate, he was transferred to San Quentin Ranch (a minimum security facility) 18 days later. Subsequently, while participating in a work furlough program, Raines was hospitalized following an auto accident. Correctional authorities found Raines "guilty, with an explanation" of failure to return docked him 10 days' good time credit, and transferred him to Vacaville, where he was mistakenly categorized as a parole violator. Shipped back to San Quentin July 20, Raines was again placed in segregation. At San Quentin, he was first told that he would be released August 10. He was not released on August 10, however, because his

segregated status and attendant lack of program prevented him from earning the further work credit on the basis of which the August 10 date had been calculated. On August 10, when Raines learned he would not be released, he suffered a nervous breakdown. He was eventually released on August 30.

33. Specifically, the Court stated that:

> Defendants have consistently confined prisoners in maximum security segregation for administrative reasons without first giving them any meaningful hearing. Typically, the inmate is transferred to a maximum security unit before he is brought before the Classification Committee. In many cases, prisoners have been confined in solitary for days--sometimes for weeks--before any hearing. In some cases, inmates have been so confined and not told the reasons, even informally, until appearance before the Committee.

Wright v. Enomoto, 462 F.Supp. at 400.

34. Examples of arbitrary or inadequately documented lockups testified to by plaintiffs' witnesses include: A

prisoner locked up a gang member because his two brothers were so locked up; a prisoner locked up because he was observed talking to a gang member; a prisoner retained in lockup based on "confidential information" after being found not guilty of the offense of "pressuring activity;" a prisoner segregated because he once possessed a weapon, although he had since been in the general population; a prisoner locked up because he had once previously been locked up in another institution; and a minimum security prisoner transferred to San Quentin and locked up indefinitely following an argument with a guard. Two inmates who testified at trial are segregated, according to defendants, primarily because they chose to exercise in a yard used by reputed members of the "Aryan Brotherhood" and "Mexican Mafia." Despite defendants' strenuous argument to the contrary, the Court is not persuaded

that these examples represent isolated instances.

35. A witness with 44 years of experience in the fields of criminal justice and corrections testified that confidential inmate informants are "highly unreliable" and should not be credited without independent corroboration. The weight of evidence indicated that such informants are commonly manipulative and untruthful. Prison officials themselves admit that definitive gang member identification is almost impossible. Yet alleged gang members continue to be placed and retained in lockup based on documentation that is, by the admission of one official, "sketchy."

36. Double-celling in excess of that permitted by the preliminary injunction was ordered terminated on August 3, 1983. It was not terminated until April 24, 1984, when a motion for civil contempt had been filed by plaintiffs.

37. Some lockup inmates at San Quentin still do not receive three showers per week as required by the preliminary injunction.

38. Defendants admit noncompliance with this provision. See supra note 24.

39. Ventilation is also required as an aspect of "sanitation," another basic element of the decent treatment mandated by the Eighth Amendment. See Hoptowit, 642 F.2d at 1246.

40. It is to be noted in this regard that lockup inmates at San Quentin and Folsom lack any facility (except the toilet) other than their bunks on which to sit while confined in their cells.

41. It is relevant to this conclusion that plaintiffs, owing to the circumstances of lock confinement, lack any means of removing themselves from surrounding din for even brief periods of time.

42. Once again, it bears emphasis that the Court's conclusion is premised on

the fact that the particular inmates who are plaintiffs in this case are locked in their cells around the clock and have absolutely no means of securing access to personal cleaning facilities outside their cells except those expressly allocated by prison authorities.

43. The "inexcusable" nature of a rat infestation in isolation cells has been recognized. Holt v. Sarver, 309 F.Supp. 362, 378 (E.D.Ark. 1970). For another case ordering action to control pest infestation in a prison, see Palmigiano, 443 F.Supp. 987.

44. Plaintiffs ask the Court as well to order that defendants provide some of them with opportunities for family visits. Such visits are plainly not required by the Eighth Amendment. The Court commends the efforts defendants have made to provide such visits to as many inmates as possible, and further commends the recent efforts

defendants have made to improve and expand visiting facilities at Folsom.

45. Indeed, as discussed below, inasmuch as the State of California has chosen to make participation in work and other programs a factor significantly affecting the length of incarceration, the question whether these criteria are satisfied assumes constitutional due process significance.

46. To the extent that plaintiffs challenge as excessive the modes of force authorized by defendants, such as tear gas an high-powered rifles, the evidence fails to establish that the actual use of such devices exceeds constitutional limits. See generally Spain v. Procunier, 600 F.2d 189, 193-96 (9th Cir. 1979).

47. Cal. Penal Code § 2931 is the basic good time credit law applicable to all prisoners whose crimes were committed prior to January 1, 1983. That section

reads, in part pertinent to the issues here:

> (c) One month of [the maximum allowable] reduction [in the term of imprisonment]...shall be based solely upon participation in work, educational, vocational, therapeutic or other prison activities. [T]hose confined for other than behavior problems shall be given specified activities commensurate with the custodial status.

(Emphasis added).

Cal. Penal code § 2933 is the good time credit law applicable to all prisoners whose crimes were committed on or after January 1, 1983, and to any other prisoner who elects to be governed by its provisions pursuant to Cal. Penal Code § 2934. It states in part:

> (a) It is the intent of the Legislature that persons convicted of crime and sentenced to state prison...serve the entire sentence imposed by the court, except for a reduction in the time served in the custody of the Department of Corrections for performance in work, training, or education programs established by the Director of Corrections....

(b) ...Except as provided in subdivision (a) of section 2932, every prisoner shall have a reasonable opportunity to participate in a full-time credit qualifying assignment in a manner consistent with institutional security and available resources.

(Emphasis added).

Cal. Penal Code § 2932(a) provides in part:

(a) For any time credit accumulated pursuant to Section 2931 or to Section 2933, not more than 10 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a felony whether or not prosecution is undertaken. Not more than 90 days of credit may be denied or lost for a single act of misconduct which could be prosecuted as a misdemeanor, whether or not prosecution is undertaken. Not more then 30 days of credit may be denied or lost for a single act of misconduct defined by regulation as a serious disciplinary offense by the Department of Corrections. Any person confined due to a change in custodial classification following the commission of a serious disciplinary infraction shall, in addition to any loss of time credits, be ineligible to receive participation or worktime credit for a period not to exceed the number of days credit which have been lost for such act of

> misconduct. In unusual case, an inmate may be denied the opportunity to participate in a credit qualifying assignment for up to six months beyond the period specified in this subdivision if the Director of Corrections finds, after a hearing, that no credit qualifying program may be assigned to the inmate without creating a substantial risk of physical harm to staff or other inmates. At the end of the six-month period and of successive six-month periods, the denial of the opportunity to participate may be renewed upon a hearing and finding by the director.

48. Inmates are also afforded extensive procedural protections in connection with resolution of the question whether these standards have been met. See Cal. Penal Code § 2932(a), (c).

49. The case is thus distinct from Olim v. Wakinekona, 103 S.Ct. 1741 (1983), because California law prescribes substantive criteria for the decision whether an inmate is to be deprived of the opportunity to earn worktime or full good time credits. See id. at 1748 n. 10.

50. For the same reason, this case is unlike Gibson v. Lynch, 652 F.2d 348 (3rd Cir. 1981), cert. denied, 103 S.Ct. 3123 (1983).

51. A remedy may go beyond this, however, when there is a record of past constitutional violations and violations of past court orders. Hoptowit, 682 F.2d at 1247.

52. This admonition has little application here. The record is devoid of evidence indicating that defendants have formulated and implemented plans for improving lockup conditions at San Quentin and Folsom absent prodding from the Court, despite the many recommendations from numerous sources that such conditions be alleviated.

Original Filed
Oct. 18, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al.,	)	
Plaintiffs,	)	No. C-73-1422-SAW
v.	)	
DANIEL J. MCCARTHY, et al.,	)	
Defendants.	)	

ORDER OF REFERENCE

For reasons set forth in the Findings of Fact and Conclusions of Law entered this day, the Court has determined that this is a proper case for reference to a Special Master pursuant to Federal Rule of Civil Procedure 53. In this order, the special Master to be appointed will be referred to as "Monitor." See Fed. R. Civ. P. 53(a).

IT IS HEREBY ORDERED that the duties of the Monitor are and shall be the following:

1. To inspect from time to time each facility affected by the Court's Permanent Injunction entered this day governing the California State Prison at San Quentin ("San Quentin") and the California Sate Prison at Folsom ("Folsom").

2. To report to the Court from time to time concerning the state of compliance with the Permanent Injunction and the state of conditions of confinement in segregation at San Quentin and Folsom.

3. To advise the Court concerning any modification or modifications to the Permanent Injunction that may appear necessary or that may be requested by a party.

4. To review the placement and retention of prisoners in segregation, as provided in Part IV(D) of the Permanent Injunction.

5. To perform such other duties as the Court may assign.

The Monitor shall continue to perform these duties until such time as he may be relieved by the Court or until the Court may adopt the Monitor's written report that defendants are in full compliance with the Permanent Injunction and that conditions of confinement in segregation units at San Quentin and Folsom do not violate the Constitution. Should the Court relieve the Monitor of his duties, the Court shall have power to appoint a successor.

IT IS FURTHER HEREBY ORDERED that the powers of the Monitor are and shall be the following:

1. To enter, at any reasonable time, with or without advance notice, any part of any facility affected by the Permanent Injunction.

2. To interview, on a confidential basis or otherwise, any person, including any correctional staff member or inmate,

affected by the Permanent Injunction. Defendants shall provide suitable facilities and arrangement for the conduct of such interviews under conditions satisfactory to the Monitor.

3. To attend institutional meetings and proceedings required by the Permanent Injunction.

4. To obtain any document in the possession of any party relevant to the state of compliance with the Permanent Injunction or the state of conditions of confinement at San Quentin and Folsom.

5. To require the posting of notices in any part of any facility affected by the Permanent Injunction, in such number and form as the Monitor may direct.

6. To convene hearings concerning any matter relating to the state of compliance with the Permanent Injunction, the state of conditions of confinement in segregation at San Quentin or Folsom, or the placement or retention of any prisoners in segregation.

To this end, the Monitor is empowered to require the attendance of witnesses, including both prisoners and employees of the California Department of Corrections, to make a record of the proceedings, and to exercise all other powers described in Federal Rule of Civil Procedure 53(c).

7. To retain from time to time experts, specialists, or other persons whose advice or testimony the Monitor deems necessary or desirable for the purpose of making findings concerning the conditions of confinement in segregation at San Quentin or Folsom.

8. To review the placement and retention of prisoners in segregation, and to require the release of prisoners assigned to segregation without sufficient basis, in accordance with the provisions of Part IV(D) of the Permanent Injunction.

IT IS FURTHER HEREBY ORDERED that prior to filing any of his reports with the Court, the Monitor shall serve copies of

the proposed report upon one designated representative of counsel for plaintiffs and one designated representative of counsel for defendants (hereinafter referred to as the two "sides"). The Monitor shall afford a reasonable time within which specific written objections to the proposed report or any part thereof may be submitted by either side. Upon the request of either side, submitted in conjunction with specific written objections, the Monitor shall convene a hearing prior to filing the report with the Court. All reports of the Monitor shall be filed in accordance with Federal Rule of Civil Procedure 53(e)(1).

IT IS FURTHER HEREBY ORDERED that any report of the Monitor shall be adopted as the findings of fact and conclusions of law of the Court unless, within ten days after being served with notice of the filing of the report, either side moves to reject or modify the report. The Court will

entertain no objection to any report unless it is shown as a preliminary matter that an identical objection was submitted to the Monitor in the form of a specific written objection in accordance with the preceding paragraph of this Order. In accordance with Federal Rule of Civil Procedure 53(e)(2), the Court shall accept the Monitor's findings of fact unless clearly erroneous.

IT IS FURTHER HEREBY ORDERED that the Monitor shall be compensated at the rate of Seventy-Five Dollars ($75.00) per hour for services performed in accordance with this Order. This rate has been determined by the Court by reference to the rate the Monitor named herein would reasonably charge for comparable services performed for private clients, and is subject to change by further order of the Court. All reasonable expenses incurred by the Monitor in carrying out his duties under this Order

shall be reimbursed as costs of the mastership.

IT IS FURTHER HEREBY ORDERED that costs of the mastership, inclduing [sic] the Monitor's fees and expenses, shall be borne by defendants as part of the costs of this action. The Monitor shall submit to defendants or their designated representative periodic itemized statements of fees and expenses. All fees and expenses to requested shall be paid by defendants within fourteen (14) days of the receipt of each statement.

IT IS FURTHER HEREBY ORDERED that unless inconsistent with the express provisions of this Order of Reference, Federal Rule of Civil Procedure 53 shall govern all questions relating to the scope of this reference and the Monitor's duties and powers hereunder.

IT IS FURTHER HEREBY ORDERED that Robert R. Riggs is appointed to serve as Monitor for the Court in this action. Mr.

Riggs is a member of the State Bar of California and the bar of this Court. He received the degree of Juris Doctor from Stanford Law School in 1982, where he graduated with an outstanding record. He has since served as a law clerk for a judge of the United States Court of Appeals for the Ninth Circuit. He has also served for more than a year as a law clerk for the judge presiding in this action. In that capacity, he has ably assisted the Court in connection with all aspects of the case. Acting as law clerk-crier, Mr. Riggs was present in the courtroom nearly every day of trial. He is thoroughly familiar with the entire record in this action and with the law applicable to the issues presented. He is also thoroughly familiar with the Findings of Fact, Conclusions of Law, and Permanent Injunction entered by the Court herein. The Court reposes special

confidence in him and his capacity to serve reliably and effectively as Monitor.

Dated: October 18, 1984

STANLEY A. WEIGEL
Senior Judge

Original Filed
Oct. 18, 1984

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOSEPH TOUSSAINT, et al.,	)	
	)	No. C-73-1422-SAW
Plaintiffs,	)	
	)	
v.	)	
	)	
DANIEL J. MCCARTHY, et al.,	)	
	)	
Defendants.	)	

JUDGMENT OF PERMANENT INJUNCTION

Based upon the Findings of Fact and Conclusions of Law this day filed:

IT IS HEREBY ORDERED, ADJUDGED, and DECREED as follows:

Defendants, the Director of the California Department of Corrections, the Wardens of the California State Prison at San Quentin and the California State Prison at Folsom, their agents, servants,

employees, successors in office an all persons acting in their aid or in participation with them, are advised, enjoined and ordered as follows:

I

It is not the intent of this Permanent Injunction to prohibit nor does it prohibit the Director or any Warden from temporarily suspending compliance with all or any part of this Injunction during a state of riot or turmoil or other genuine emergency. The determination by the Director or Warden that a state of genuine emergency exits shall be set forth in writing as soon as reasonably possible, shall detail briefly with reasonable specificity the reasons for the determination, and shall be reviewable by the Court at the request of either party. The Court may permit any party to submit affidavits and documentary evidence relevant to the correctness of the determination, and may also, in its discretion, provide for the taking of

discovery or oral testimony. The determination of the Director or Warden, if supported by substantial evidence, shall be conclusive. The Monitor hereinafter provided for may receive such affidavits and documentary evidence, provide for such discovery and oral testimony and, on the basis thereof, make recommendations to the Court as to what action, if any, it should take in review.

II

Defendants, by immediate and continuous efforts, shall provide as follows with respect to all present and future members of the plaintiff class:

1. Each prisoner, upon initial assignment to segregation and upon each cell transfer while remaining in segregation, shall be provided with a clean cell, furnished with at least a bed, cot or bunk and a clean, untorn mattress, a clean, untorn blanket, a clean, untorn pillow, a

properly functioning toilet and a properly functioning sink.

2. No prisoner assigned to segregation shall be involuntarily double-celled with another prisoner in any cell smaller than seventy (70) square feet.

3. All cells in which prisoners assigned to segregation are housed shall be provided with adequate heat and adequate ventilation. Defective or clearly inadequate heating and ventilating equipment and broken windows shall be repaired or replaced promptly.

4. Each facility used to house prisoners assigned to segregation shall be equipped with adequate plumbing and sewage disposal systems. Leaking pipes and fixtures, clogged or defective drains, and clogged or defective sewer lines shall be repaired or replaced promptly.

5. Any prisoner assigned to a cell in which there is no significant source of natural light, or from which all

significant natural light can be excluded without the control of the prisoner, shall have under his control at all times a source of artificial light adequate to illuminate the cell. All cells used to house prisoners assigned to segregation shall be equipped with a source of artificial illumination sufficient to permit the occupant to read comfortably while seated or lying on his bunk or bed. All electric lights inside cells shall be connected to a functioning on-off switch that is under the control of the occupant during hours when the use of such lights is permitted.

6. Defendants shall undertake immediate steps to abate the levels of noise prevailing in five-tier cell blocks used to house segregated inmates. The following specific measures shall be undertaken unless and until defendants reduce the noise to acceptable levels by alternate means: (1) Inmates shall not be

permitted to employ any loudspeaking device, including, for example, those devices included in television, radios, and stereophonic equipment, unless the device is incapable of producing sound noticeably audible to any person outside the cell of the inmate using the device. (2) Defendants shall install sound-absorbing wall coverings in all five-tier units. (3) Defendants shall provide each inmate assigned to segregation and housed in a five-tier cell block with a set of medically approved sound exclusion devices such as, for example, earplugs. If earplugs are used, they shall be issued monthly.

7. Each facility used to house prisoners in segregation shall be equipped with electrical wiring reasonably safe from danger of fire or electrocution.

8. Each facility used to house prisoners in segregation shall be reasonably safe from danger of death or

serious injury caused by fire. Defendants shall develop and rehearse plans for the speedy egress of all segregated inmates in the event of serious fire.

9. Each prisoner assigned to segregation shall be provided with clean, untorn clothing reasonably appropriate in size. Such clothing shall be laundered on a regular, not less than bi-weekly, basis. Blankets shall be laundered not less than once every six months. Towels and sheets shall be laundered not less than once every two weeks. This provision does not require defendants to relieve any prisoner of the consequences to that prisoner of damage done deliberately by the prisoner to clothes, blankets, towels or sheets.

10. Each prisoner assigned to segregation and housed in a cell without hot running water shall be permitted no less than three (3) showers each week. All shower facilities used by prisoners assigned to segregation shall be maintained

in reasonably sanitary condition with adjustable hot and cold running water. Defendants shall ensure that each prisoner assigned to segregation is supplied with adequate quantities of materials necessary to sound personal hygiene.

11. Each facility used to house segregated inmates shall be maintained in sanitary condition. Defendants shall undertake the following specific measures to ensure adequate sanitation: (1) Each prisoner shall be required to maintain his cell in reasonably sanitary condition. (2) Each prisoner shall be provided with a container in which to store garbage. Garbage shall be collected from each cell on a regular basis not less than once every day. (3) Tiers and floors shall be maintained in a reasonably clean and sanitary condition. (4) "Pipe chases" or service areas shall be maintained in reasonably clean and sanitary condition, free of sewage, refuse, standing or leaking

water, or any other noxious substance (including gases). (5) Standing water shall be promptly removed from any portion of any unit in which it may accumulate. If necessary, drains shall be installed to carry out this provision.

This provision does not require defendants to relieve any prisoner of the consequences to that prisoner of any damage, misbehavior, or failure to perform required cleaning tasks done or omitted deliberately by that prisoner.

12. Each unit used to house prisoners in segregation shall be maintained reasonably free of rodents, birds, insects and other vermin. Unless and until the intendment of this provision is accomplished by alternate means, defendants shall employ on a full-time basis at each prison at least one person whose exclusive duty is to manage the task of eradicating vermin.

13. All food shall be stored, prepared and served under healthful, sanitary conditions, free of spoilage or vermin infestation.

14. Each prisoner assigned to segregation shall be provided with an opportunity for outdoor exercise at least:

(a) one (1) hour every day, for a minimum total of eight (8) hours per week; or

(b) two (2) hours every other day, for a minimum total of eight (8) hours per week; or

(c) three times per week, for a minimum of one (1) hour each time, for a minimum total of ten (10) hours per week.

The provision of exercise may be suspended for a period not to exceed ten days as to any prisoner if the suspension is based upon genuine reasons of discipline, inmate safety or prison security. When weather is inclement during a period of outdoor exercise, exercising inmates shall be issued suitable rain gear.

15. In the absence of specific and compelling security reasons, documented in writing, all prisoners assigned to segregation shall be permitted to visit and use an adequate prison law library as reasonably necessary. Any prisoner denied direct access to the law library for documented reasons of security shall be permitted to order at least five books per week from that library. Books so ordered shall be delivered promptly and without fail.

Each prisoner assigned to segregation shall be provided upon request with a complete listing of all books available in the prison law library and all books, if any, available to prisoners form other sources.

III

A.

The requirements of the order entered by the Court in Wright v. Enomoto, 462 F. Supp. 397, 404-05 (N.D. Cal. 1976), aff'd, 434 U.S. 1052 (1978), remain in full force

and effect. All of those requirements are hereby incorporated in this Permanent Injunction as if set forth in full herein.

B.

For the reasons detailed in the Findings of Fact and Conclusions of Law, the relief granted in Wright v. Enomoto failed to correct defendants' arbitrary practices in imposing segregation for "administrative" reasons, and in retaining prisoners in segregation for such reasons. Defendants shall provide the following additional procedural safeguards to all present and future members of the plaintiff class housed at San Quentin and Folsom:

1. A prisoner shall be released from segregation upon his Minimum Eligible Release Date (MERD), if any, or at the expiration of twelve (12) months of consecutive confinement in segregation, whichever is shorter, unless before said MERD or before said period expires, he is afforded all the hearing rights that attend

initial placement in segregation. To retain the prisoner in segregation, it must be found after a fair hearing that

> (a) The prisoner has committed a disciplinary offense for which a MERD has been assigned, and the MERD has not yet been reached; or
>
> (b) Release of the prisoner would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct; or
>
> (c) The prisoner has requested voluntarily continued retention segregation.

2. The identity of any person providing information cited in support of placement or retention of a prisoner in segregation may be withheld at the hearing only if disclosure would endanger the safety of the source or institutional security. In any instance where the identity of the source is withheld, the prisoner shall not be placed or retained in segregation in the absence of a written statement, available to the prisoner,

setting forth an evaluation of the reliability of the source and a statement of the reasons why the identity of the source is not disclosed.

3. A prisoner shall not be placed or retained in segregation on the basis of undisclosed information.

C.

No prisoner assigned to segregation shall be denied the opportunity to participate in a work, educational, or vocational training assignment for which sentence credit may be earned in accordance with California law unless it is first determined, in accordance with such law, that the prisoner has committed an act of misconduct which could be prosecuted as a felony or misdemeanor or which is defined by regulations of the California Director of Corrections as a serious disciplinary offense. Upon such a determination, the prisoner may be denied the opportunity to participate only for the term fixed by

California law. See Cal. Penal Code § 2932(a). In unusual cases, the prisoner may be denied the opportunity to participate for additional six (6) month periods upon the determination of the Director of Corrections, reached in accordance with California law, that no credit qualifying assignment may be provided to the prisoner without creating a substantial risk of physical harm to staff or other inmates.

Prisoners assigned to segregation solely at their own request shall be permitted the opportunity to participate in credit qualifying assignments.

IV

A.

Pursuant to Fed. R. Civ. P. 53, the court will appoint a Special Master (referred to herein as "Monitor") to monitor the progress of defendants in carrying out the provisions of this Permanent Injunction. Among the duties of

the Monitor shall be to inspect each facility affected by this Injunction, to report to the Court from time to time concerning the state of compliance with this Permanent Injunction and the state of conditions of confinement in segregation at San Quentin and Folsom, and to advise the Court concerning any modifications to this Permanent Injunction that may appear necessary or that may be requested by a party. Defendants shall honor all requests by the Monitor for admission into any part of any facility affected by this Permanent Injunction. Defendants shall likewise honor all requests by the Monitor for the production of documents relevant to the state of compliance with this Injunction or the state of conditions of confinement in segregation. The duties of the Monitor shall continue until such time as he may be relieved by the Court or until the Court may adopt the Monitor's written report that defendants are in full compliance with the

Permanent Injunction and that conditions of confinement in segregation units at San Quentin and Folsom do not violate the Constitution. Should the Court relieve the Monitor of his duties, the Court shall have power to appoint a successor Monitor. The period of time from the date of this Permanent Injunction to the date of the Monitor's certification shall be known as the "Interim Period."

B.

For the duration of the Interim Period, the following additional procedures set forth in this Part IV shall be followed in connection with the placement and retention of prisoners in segregation:

1. A prisoner may be placed in segregation only as follows:

> (a) The prisoner has committed a disciplinary offense sufficiently serious to warrant punishment by confinement for a fixed term in segregation, and the term fixed is reasonable; or
>
> (b) Continued presence of the

prisoner in the general population would severely endanger the lives of inmates or staff, the security of the institution, or the integrity of an investigation into suspected criminal activity or serious misconduct; or

(c) The prisoner has requested segregation for his own protection; or

(d) The prisoner is newly arrived at the prison and more information is needed to determine whether the prisoner may be incompatible with any element of the general prison population. No prisoner shall be involuntarily segregated for this reason for more than ten (10) days.

C.

A prisoner may be retained in segregation only for a reason listed in Part III(B)(1) of this Permanent Injunction.

D.

Any prisoner assigned to segregation as of the date of this Permanent Injunction shall be entitled to request release from segregation on the ground that there is no sufficient basis for retaining him in

segregation in accordance with Part IV(C). A prisoner may submit a written statement of reasons in support of such a request. Such requests shall be considered initially by defendants or their designate, who shall determine whether to release the prisoner from segregation. If the prisoner is not released from segregation, within 21 days after the date of the request, he shall be entitled to request review by the Monitor of the decision to retain him in segregation.

Any prisoner placed in segregation during the Interim Period shall be entitled to request review by the Monitor of the decision to place him in segregation. The scope of such review shall include, but is not limited to, the adequacy of compliance with Part III(A) of this Injunction.

Any prisoner retained in segregation on the basis of the finding described in Part III(B)(1) of this Injunction shall be entitled to request review by the Monitor

of the decision to retain him in segregation. The scope of such review shall include, but is not limited to, the adequacy of compliance with Part III(B) of this Injunction.

Upon a proper request for review by the Monitor pursuant to this Part of the Injunction, defendants shall immediately forward to the Monitor (1) the prisoner's request for review; (2) any written statement by the prisoner in support of his request; (3) any statement by the defendants or their designate of reasons in support of the decision to place or retain the prisoner in segregation; (4) copies of all documents and all testimony, if transcribed, relied upon by defendants in support of the decision to place or retain the prisoner in segregation; and (5) a summary of the proceedings, if any, conducted by defendants in connection with the decision to place or retain the inmate in segregation.

Following review of the materials forwarded, the Monitor may in his discretion convene a hearing or order such further proceedings as he may deem appropriate. Defendants shall provide suitable facilities for the conduct of any hearing ordered, and shall produce such witnesses and/or evidence at such time and place as the Monitor may direct. If the Monitor concludes, on the basis of all evidence submitted, that the prisoner was placed or retained in segregation in violation of any provision of this Permanent Injunction, he may order the prisoner released from segregation, or he may order defendants to conduct further proceedings if required by this Injunction.

Any decision of the Monitor upholding placement or retention of a prisoner in segregation shall be conclusive and subject to no further review.

Any final decision of the Monitor requiring release of a prisoner from

segregation shall be set forth in writing and shall be subject to review by the Court upon motion of defendants. Defendants may file with the Court a memorandum in support of their request. Unless the Court vacates the decision of the Monitor within thirty (30) days following the filing of defendants' motion, the decision of the Monitor shall be final.

Defendants shall provide to each plaintiff a notice, in a form approved by the Monitor, of the rights of plaintiffs under this Part of the Permanent Injunction.

V.

Defendants shall provide a copy of this Permanent Injunction to each member of the plaintiff class at San Quentin and Folsom within ten days of the date of this Injunction, and shall post a copy in each segregation unit where it may readily be seen by class members. Defendants shall also provide a copy of this Permanent

Injunction to every employee of the California Department of Corrections at San Quentin and/or Folsom.

No person who has notice of this Permanent Injunction shall fail to comply with the letter and spirit hereof nor shall any person subvert the letter or spirit hereof by any sham, indirection or other artiface [sic].

VII

The Court retains jurisdiction to modify this Injunction at any time and from time to time on its own motion or upon the motion of any party in the interest of effectuating in its intendments or in the interest of furthering the ends of justice under all applicable law.

Dated: October 18, 1984.

STANLEY A. WEIGEL
Senior Judge

Filed
Dec. 31, 1986

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSEPH TOUSSAINT, et al.,	)	C.A. Nos.
	)	84-2833
Plaintiffs-Appellees,	)	85-1507
	)	85-1878
v.	)	85-2526
	)	
DANIEL McCARTHY, et al.,	)	D.C. No. CV
	)	73-1422 SAW
Defendants-Appellants.	)	
	)	ORDER

Before: WRIGHT, KENNEDY AND BEEZER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

28 U.S.C. § 2241

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States, or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations;

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for writ of habeas corpus is made by a person in custody under the judgment and sentence of

a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court of the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted an sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 U.S.C. § 2254

§ 2254. State custody; remedies in State courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ

of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State

court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of

the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in the paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by

the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the state court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the

clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of

Columbia shall be considered to be a statute of the District of Columbia.

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1588

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

DANIEL J. MCCARTHY, DANIEL VASQUEZ
and ROBERT BORG,
Petitioners,

vs.

JOSEPH TOUSSAINT, et al.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether in a civil rights action brought under 42 U.S.C. § 1983, a Court of Appeals may affirm the district court's authority to order individual prisoners released on a proper showing from segregation to less restrictive general population custody during an interim period that will last only until lock-up conditions meet conditions meet constitutional minima, in circumstances where (1) state prison officials are operating prison lock-up facilities that uncontestedly violate the Eighth Amendment to the Constitution of the United States, (2) the prisoners enjoy a liberty interest in being free from placement or retention in the lock-up units, and (3) for a decade the defendants have persistently violated injunctions that were designed to remedy the unconstitutional lock-up conditions and to control unjustified, arbitrary and

capricious placement and retention of prisoners in those conditions? (See Question No. 2 in Joseph Toussaint, et. al.'s, related Petition for Writ of Certiorari in No. 86-1587).

2. Whether in a case in which the Court of Appeals affirmed the findings of a district court that defendants' paging system for providing access for lock-up inmates to prison law libraries is both intrinsically and as operated inadequate for meaningful access to the courts, and the defendants have violated prior court orders addressing access to the law libraries, the Court of Appeals may require that the defendants' also provide physical access to law libraries and/or legal assistance to these inmates?

LIST OF PARTIES

Defendants-Petitioners are Daniel McCarthy (Director, California Department of Corrections (CDC)), and the wardens at the California State Prisons at San Quentin (Dan Vasquez) and at Folsom (Robert Borg). Plaintiffs-Respondents constitute a class of maximum security, minimum privilege inmates in the custody of the CDC at the California State Prisons at San Quentin and Folsom (as well as at the California Training Facility at Soledad and the Deuel Vocational Institution (DVI)). The individual class representatives are Joseph Toussaint, Michael Cowans and Welve Johnson.

TABLE OF CONTENTS

	Page
COUNTER STATEMENT OF QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	viii
OPINIONS BELOW	3
JURISDICTION AND STATUTES PRESENTED	4
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI	5
I. GIVEN THE RECORD IN THIS CASE THE NINTH CIRCUIT'S DECISION THAT THE DISTRICT COURT MAY ORDER INDIVIDUAL PLAINTIFFS TRANSFERRED FROM UNCONSTITUTIONAL CONDITIONS IN LOCK-UP TO LESS RESTRICTIVE CONFINEMENT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS AND DOES NOT RAISE AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW	5

Page

A. The Controlling Decisions of this Court Make it Plain That the Ninth Circuit Correctly Sustained the District Court's Authority, In This Section 1983-Eighth Amendment Prison Conditions Case, to Order Individual Inmates Transferred from Lock-up to General Population Units Upon a Proper Showing 7

B. There is No Conflict Between the Ninth Circuit Decision in this Case and Decisions of Other Circuits 18

II. CONSIDERED ON THE RECORD OF THIS CASE, THE NINTH CIRCUIT'S DECISION REQUIRING THAT PLAINTIFFS BE AFFORDED MEANINGFUL PHYSICAL ACCESS TO AN ADEQUATE LAW LIBRARY AND/OR A LEGAL ASSISTANCE PROGRAM RAISES NO IMPORTANT UNRESOLVED ISSUE OF LAW AND PRESENTS NO CONFLICT AMONG THE CIRCUITS 25

CONCLUSION 41

TABLE OF AUTHORITIES

Pages

Cases

Arsberry v. Sielaff,
586 F.2d 37 (7th Cir. (1978) ... 38

Boudin v. Thomas,
732 F.2d 1107 (2nd Cir. 1984) .. 19

Bounds v. Smith,
430 U.S. 817 (1977) ..... passim

Caldwell v. Miller,
790 F.2d 589 (7th Cir. 1986) ... 39

Campbell v. Miller,
787 F.2d 217 (7th Cir. 1986) ... 39

Canterino v. Wilson,
562 F.Supp. 106
(W.D.Ky. 1983) 34

Cepulonis v. Fair,
732 F.2d 1 (1st Cir. 1984) 34

Corgain v. Miller,
708 F.2d 1241
(7th Cir. 1983) 34

Cruz v. Hauck,
627 F.2d 710 (5th Cir. 1980) ... 31,33
35

Frazier v. Ward,
426 F.Supp. 1354
(N.D.N.Y. 1977) 34

Green v. Ferrell,
801 F.2d 765 (5th Cir. 1986) ... 33

Hewitt v. Helms,
459 U.S. 460 (1983) 11,17

Pages

Cases (Continued)

Hooks v. Wainwright,
775 F.2d 1433
(11th Cir. 1985) 36

Hutto v. Finney,
437 U.S. 678 (1978) 13,16
17

Jackson v. Carlson,
707 F.2d 943 (7th Cir. 1983),
cert. denied 464 U.S. 861 19,21

Kendrick v. Bland,
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(W.D.Ky. 1984) 33

Krist v. Ricketts,
504 F.2d 887 (5th Cir. 1974) ... 19,23

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of Corrections,
776 F.2d 851 (9th Cir. 1985) ... 39

Lovell v. Brennan,
566 F.Supp 672
(D.Maine 1983) 34

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563 F.Supp. 984 (1983) 33,34

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77 F.2d 1178
(7th Cir. 1985) 18,20

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(7th Cir. 1982) 19,22

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Pages

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768 F.2d 619 (5th Cir. 1985) ... 32,33

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461 U.S. 238 (1983) 11

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March 20, 1987, No. 86-7579 34,40

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36

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94 L.Ed.2d 203 (1987) 17

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No. 86-1588

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

DANIEL J. McCARTHY, DANIEL VASQUEZ
and ROBERT BORG,
Petitioners,

v.

JOSEPH TOUSSAINT, et al.,

Respondents.

OPPOSITION OF JOSEPH TOUSSAINT, ET AL., TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The plaintiff class, constituting several thousand lock-up inmates subject to petitioner-defendants' custody and control in California maximum security prisons, by the undersigned counsel, respectfully request that this Court deny defendants' Petition for Writ of Certiorari. However, regardless of

whether this Petition is denied or granted, plaintiffs urge that the Court grant their related Petition for Writ of Certiorari in No. 86-1587.

Plaintiffs contend that no grounds exist for granting the defendants' Petition for Writ of Certiorari as: (1) the uncontested facts demonstrate that the due process and court access remedies ordered by the United States Court of Appeals for the Ninth Circuit, that the defendants contest, are appropriate remedies in the context of this prison conditions lawsuit; (2) the decision of the Ninth Circuit in regard to these remedies does not conflict with any decision of this Court and does not raise an important unresolved question of law; and (3) the decision of the Ninth Circuit in regard to these remedies does not evidence a conflict among the circuits.

OPINIONS BELOW

The opinions below are identified in full in plaintiffs' related Petition for Writ of Certiorari in No. 86-1587 at 2-5 (hereinafter "Plaintiffs' Petition."), and in the defendants' Petition in the instant proceedings (No. 86-1588) at 1-2 (hereinafter "Defendants' Petition"). These opinions are included in both the Appendix to the Plaintiffs' Petition (hereinafter "Plaintiffs' Appendix" or "Pl.App.") and the Appendix to Defendants' Petition (hereinafter "Defendants' Appendix" or "Df.App.").

JURISDICTION AND STATUTES PRESENTED

These matters are accurately set forth in Defendants' Petition at 2-3 and Plaintiffs' Petition at 5-7. The relevant constitutional provisions are contained in Plaintiffs' Appendix and Defendants' Appendix.

STATEMENT OF THE CASE

An accurate Statement of the Case is included in Defendants' Petition at 3-9. An accurate and more complete Statement of the Case with respect to Question No. 1 in Defendants' Petition and Counter Statement of Question No. 1 in this Opposition (the due process question) is included in Plaintiffs' Petition at 7-25. Additional facts pertaining to the law library-court access question (No. 2) are included in Statement of Reasons for Denying the Petition, infra.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

GIVEN THE RECORD IN THIS CASE THE NINTH CIRCUIT'S DECISION THAT THE DISTRICT COURT MAY ORDER INDIVIDUAL PLAINTIFFS TRANSFERRED FROM UNCONSTITUTIONAL CONDITIONS IN LOCK-UP TO LESS RESTRICTIVE CONFINEMENT DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS AND DOES NOT RAISE AN IMPORTANT UNRESOLVED ISSUE OF FEDERAL LAW.

The Ninth Circuit has sustained the district court's authority, during an "interim period" that will last until the conditions in lock-up meet constitutional minima, to review lock-up retention decisions and to order transferred from lock-up units individual inmates whose placement in lock-up do not meet specified placement and retention criteria. Relying on Preiser v. Rodriguez, 411 U.S. 475 (1973), the defendants assert that habeas corpus is

the exclusive remedy for prisoners seeking release from lock-up because the lock-up prisoners seek release or transfer to less restrictive confinement. Contrary to defendants' assertion, the Ninth Circuit's decision is not inconsistent with this Court's decision in Preiser. Moreover, other decisions of this Court concerning challenges to tranfers to more restrictive confinement conclusively show that an action brought pursuant to 42 U.S.C. § 1983 is a proper means for a prisoner to seek a transfer from lock-up confinement.

A. The Controlling Decisions of this Court Make it Plain That the Ninth Circuit Correctly Sustained the District Court's Authority, In this Section 1983-Eighth Amendment Prison Conditions Case, to Order individual Inmates Transferred from Lock-up to General Population Units Upon a Proper Showing.

As the Ninth Circuit noted, the state prisoners in Preiser sued in federal district court under 42 U.S.C. § 1983 alleging that they were deprived of good-time credits improperly. See Preiser, supra, 411 U.S. at 476. The prisoners sought injunctive relief to compel restoration of the credits. Id. This Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal

remedy is a writ of habeas corpus." Id. at 500. See Toussaint v. McCarthy, 801 F.2d 1080, 1102-03 (9th Cir. 1986), Pl.App. 1, 88-89.

As the Ninth Circuit also observed (801 F.2d at 1103, Pl.App. 89-90), in Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974), this Court held that Preiser only precludes restoration of credits in an action brought under 42 U.S.C. § 1983. The Court stated "that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled." Id. at 555 (footnote omitted).

The Ninth Circuit also correctly

noted (801 F.2d at 1103, Pl.App. 90) that, in the instant case, the district court did not restore credits nor release any inmate from prison. The district court, in essence, merely authorized its monitor to move individual prisoners from one location to another within the prisons upon appropriate showings. Such relief does not fall within the traditional core of habeas corpus. Hence the Ninth Circuit was correct in holding that the district court did not exceed its jurisdiction under 42 U.S.C. § 1983 by authorizing the transfer of prisoners from lock-up to less restrictive confinement, and that the plaintiffs need not exhaust state remedies before seeking this form of relief in federal court.

A number of other post-Preiser decisions of this Court show that habeas corpus is not the exclusive remedy for

state prisoners seeking placement in a less restrictive part of a prison. For example, in Meachum v. Fano, 427 U.S. 215 (1976), a prisoners' 42 U.S.C. § 1983 action sought, inter alia, "an injunction setting aside the ordered transfer [from a medium to a maximum security prison]." Id. at 222. The district court granted relief, ordering the prisoners returned to the general population of the medium security prison, and the Court of Appeals affirmed. Ibid. This Court reversed on the ground that due process was not implicated by the challenged transfers. However, the Court did not suggest that a civil rights action was an improper means to seek the requested relief. The companion decision to Meachum, Montanye v. Haymes, 427 U.S. 236 (1976), also considered a Section 1983 action challenging a transfer without suggesting

that such relief was not permitted in such an action.

In Vitek v. Jones, 445 U.S. 480 (1980), the district court's order enjoining a transfer of a prisoner to a mental hospital was affirmed. Again, this Court did not suggest that the prisoner must use habeas corpus to challenge the transfer, even though a transfer to a mental hospital would have clearly placed more restraints on the prisoner. Similarly, in Hewitt v. Helms, 459 U.S. 460 (1983) this Court considered a prisoner's due process action brought under 42 U.S.C. § 1983, which challenged his placement in administrative segregation, without suggesting that he had chosen the wrong form of action. Finally, in Olim v. Wakinekona, 461 U.S. 238 (1983), a prisoner convicted in Hawaii state court challenged by means of

a 42 U.S.C. § 1983 action his transfer to Folsom State Prison in California. In reviewing the Ninth Circuit's decision in that case, once again this Court did not suggest that habeas corpus was required to challenge the placement in the California prison.

Almost any action for injunctive relief by a prisoner who seeks to vindicate constitutional rights asks for less restrictive confinement, whether it be a request to enjoin practices restrictive of First Amendment rights, or for an order requiring the upgrading of conditions to meet Eighth Amendment standards. Would defendants require a habeas corpus petition to initiate all prison conditions actions except those seeking monetary relief?

Clearly, Preiser does not support such a wholesale revision of federal

jurisprudence. Nor does Preiser qualify the power of the district courts to provide a complete and full remedy both (1) for proven long-standing violations of the Eighth Amendment and (2) for persistent violation of court injunctions imposed both to eliminate cruel and unusual conditions and to assure full enjoyment of the due process that protects the prisoners' liberty interest in being free from arbitrary and unwarranted lock-up confinement. See Hutto v. Finney, 437 U.S. 678, 685-87 (1978). Those are the facts in this case.

The instant case involves confinement of hundreds of inmates in segregation for extended periods (often exceeding two years) on the basis of unreliable and undisclosed information for reasons often vague or unspecified

and unrelated to the conduct of the inmate. The conditions of confinement in the lock-up units at San Quentin and Folsom have for more than a decade grossly violated the Eighth Amendment. Toussaint v. McCarthy, 597 F.Supp. 1388 1393-1405, 1408-20 (Pl.App. 178-246, 257-323). Further, procedural safeguards established in this case more than a decade ago (and sustained by this Court) "have been consistently overlooked or disobeyed" by the defendants. 597 F.Supp. at 1418-19 (Pl.App. 310). The additional procedural protections imposed by a preliminary injunction in Toussaint v. Rushen, 553 F.Supp. 1365 (N.D.Cal. 1983) (Pl.App. 435), aff'd except as to food services, sub nom. Toussaint v. Yockey, 722 F.2d. 1490 (9th Cir. 1984) (Pl.App. 408), were also disobeyed. Toussaint v. McCarthy, supra, 597 F.Supp.

at 1407-08 (App. 255-257). Even more significantly, the evidence at trial in this case made it clear that the procedural protections imposed in Wright v. Enomoto, 462 F.Supp. 397 (N.D.Cal. 1976 Three Judge) (Pl.App. 549), summarily aff'd, 434 U.S. 1052 (1978) (Pl.App. 540), and the Toussaint preliminary injunction do not adequately protect against unjustifiable, arbitrary and capricious lock-up decisions. See Toussaint v. McCarthy, supra, 597 F.Supp. at 1405-07, 1415-16, 1418 (Pl.App. 246-255, 297-298, 308-310).

Examples abound of continued violations of the district court's orders at the time of trial. Inmates continued to be placed in lock-up without timely notice or hearing. 597 F.Supp. at 1406 (Pl.App. 251). The notice often was not "as required by the Court's order

[citations omitted] 'in sufficient detail to enable the prisoner to prepare a response or defense.'" Id. at 1406-07 (Pl.App. 251). The lock-up hearings tended to be perfunctory. Id. at 1407 (Pl.App. 251). Even if a determination was favorable to the prisoner, he might be retained in lock-up for substantial periods due to lack of cell space in general population. Id. at 1407 (Pl.App. 255). Thus, unjustified and arbitrary confinement in lock-up remained commonplace. Id. at 1415-16 (Pl.App. 297-299).

Under this Court's decision in Hutto v. Finney, 437 U.S. 678 (1978), consideration of unconstitutional conditions in lock-up, the duration of confinement in lock-up, the presence of a consistent pattern of unjustified and arbitrary lock-up decision making, and

disobedience of prior court orders are relevant to the 42 U.S.C. § 1983 remedy. In that case the Court considered both violation of previous orders and long standing unconstitutional conditions in lock-up, as well as the duration of lock-up confinement (437 U.S. at 685-87), as justifying a district court in Arkansas to enter "a comprehensive order [including a limitation on the length of time for which an inmate could be held in lock-up] to ensure against the risk of inadequate compliance." 437 U.S. at 687 (footnote omitted); see Hewitt v. Helms, 459 U.S. 460, 468 (1983); id. at 481 n. 4 (Stevens, J., dissenting). Cf. United States v. Paradise, 480 U.S. _____, 94 L.Ed.2d 203, 223-27, 231-32; id. at 234-35 (Powell, J. concurring); id. at 235-39 (Stevens, J. concurring). As Hutto makes plain, Preiser does not

control federal remedy or federal court jurisdiction in a prison conditions case like the instant one.

B. There Is No Conflict Between the Ninth Circuit Decision in this Case and Decisions of Other Circuits.

The defendants contend that there is a conflict between the Ninth Circuit's decision in this case and decisions of the Second, Fifth and Seventh Circuits, in that those Circuits "have recognized, a state prisoner seeking release from segregation must challenge his confinement there by a petition for writ of habeas corpus, not by an action for injunctive relief under the Civil Rights Act." Defendants' Petition at 12.

Defendants cite the following cases in support of their declared conflict. McCall-Bey v. Franzen, 777 F.2d 1178,

1191 (7th Cir. 1985); Boudin v. Thomas, 732 F.2d 1107, 1111 (2nd Cir. 1984); Jackson v. Carlson, 707 F.2d 943, 946 (7th Cir. 1983), cert. denied, 464 U.S. 861 (1983); McCollum v. Miller, 695 F.2d 1044, 1046 (7th Cir. 1982); Streeter v. Hopper, 618 F.2d 1178, 1181 (5th Cir. 1980) Krist v. Ricketts, 504 F.2d 887-88 (5th Cir. 1974). These decisions do not, however, evidence a conflict with the Ninth Circuit's decision in this case. They simply approve an inmate's use of the writ of habeas corpus to seek a transfer from one type of confinement to another. They do not address the availability of judicial review of lock-up retention decisions as a remedy in a comprehensive 42 U.S.C. § 1983 action.

Boudin involved a single federal prisoner's complaint, treated as a habeas

corpus petition, challenging her conditions of confinement in lock-up and seeking transfer to the general prison population. In this context, the Second Circuit held that "habeas is the appropriate action to challenge conditions of confinement where the prisoner seeks to be moved in order to remedy past constitutional violations." 732 F.2d at 1111. That court did not hold or suggest, however, that a Section 1983 action would be improper. Nor did it hold or suggest that a district court lacked the authority in a Section 1983 class action to order transfers as part of a comprehensive Eighth Amendment and due process remedy.

McCall-Bey involved district court enforcement of a consent decree in a Section 1983 class action. The Seventh Circuit reviewed the district court's

order for return of an inmate to a work release program on the merits and reversed, without questioning the district court's authority to make such an order in an appropriate case. The Seventh Circuit also speculated that the inmate's letter initiating the district court action could have been construed either as a habeas corpus petition or a new Section 1983 complaint. 777 F.2d at 1191.

Jackson was a consolidated appeal involving five habeas corpus petitions filed by federal prisoners seeking due process review of disciplinary lock-ups. Four of the petitioners alleged denial of good time credits. In these circumstances, which involved no complaint about conditions of confinement or Eighth Amendment class issues, the Seventh Circuit held that "the suit may

be maintained as a habeas corpus suit." 707 F.2d at 946.

McCollum also involved consolidated appeals in the several habeas corpus proceedings involving due process claims of four federal inmates. One inmate complained about a disciplinary confinement to lock-up. The Seventh Circuit held "that habeas corpus can be used to get from a more to a less restrictive custody . . . ." 695 F.2d at 1046. That court did not state or imply that a Section 1983 action would be improper or that a release remedy could not be imposed in such an action that challenges conditions of confinement in lock-up under the Eighth Amendment.

In Streeter v. Hooper, 618 F.2d 1178 (5th Cir. 1980), the Fifth Circuit treated two Georgia state prisoners' habeas corpus petitions, seeking transfer

to an institution at which their safety could be assured, as though the petitions were a 42 U.S.C. § 1983 complaint challenging these plaintiffs' conditions of confinement under the Eighth Amendment. The Fifth Circuit held that a complaint "seeking release from the imposition of administrative segregation without due process, would be appropriately treated as a habeas corpus petition, requiring exhaustion of state judicial remedies." 618 F.2d at 1181. However, the court specifically held that the Eighth Amendment claim was "within the ambit of § 1983 and exhaustion of state judicial remedies is not required." Id. Compare Krist v. Ricketts, 504 F.2d 887 (5th Cir. 1974) (a pre-Preiser decision involving a single state inmates procedural due process claim). Plainly, the Fifth Circuit's approach is

consistent with the Ninth Circuit's decision in this case at least as to the availability of a transfer remedy in a Section 1983-Eighth Amendment conditions of confinement case; and the Ninth Circuit's decision here is plainly correct.

II.

CONSIDERED ON THE RECORD OF THIS CASE, THE NINTH CIRCUIT'S DECISION REQUIRING THAT PLAINTIFFS BE AFFORDED MEANINGFUL PHYSICAL ACCESS TO AN ADEQUATE LAW LIBRARY AND/OR A LEGAL ASSISTANCE PROGRAM RAISES NO IMPORTANT UNRESOLVED ISSUE OF LAW AND PRESENTS NO CONFLICT AMONG THE CIRCUITS.

Prisoners have a fundamental right to "adequate, effective and meaningful access to the courts." Bounds v. Smith, 430 U.S. 817, 822 (1977). The right of access to the courts requires prison authorities to assist prisoners to prepare and file legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. Id. at 828.

The defendants purport to have met their obligation under Bounds by providing lock-up inmates access to law books through a "paging" system which allows them the opportunity to order a few books at a time from the law library.

Toussaint v. McCarthy, supra, 597 F.Supp. at 1403 (Pl.App. 231-33). The books are supposed to be delivered to their cells a few days later and must be returned within a few days. Ibid. No qualified legal assistants are available to help lockup inmates in identifying the appropriate legal authorities and resource books to consult. Ibid.

The district court found that "effective legal research under the current paging system is virtually impossible," id. at 1403 (Pl.App. 232), and concluded that "even an individual highly trained in the law would be unable to secure meaningful access to the courts through such a system." id. at 1413 (Pl.App. 286-87).

The district court also found that:

> The prison libraries themselves are incomplete and over-taxed. Volumes are missing from most commonly-used sets, as are recent

> supplements to codes. Libraries at both prisons lack basic treatises and instructional texts. Demand for books in the existing collection at San Quentin is so great that an unmanageable backlog of hold requests has accumulated. The library director stated that he will be forced henceforth to abolish the system of hold requests. Lockup inmates will instead be required to request desired books continuously until the books happen to be available. Lockup inmates have no way to learn of the return of volumes they seek.
>
> Id. at 1403, Pl.App. 232-33.

On this record, the district court held the paging system constitutionally deficient, Id. at 1413, (Pl.App. 285-86), and enjoined defendants as follows:

> In the absence of specific and compelling security reasons, documented in writing, all prisoners assigned to segregation shall be permitted to visit and use an adequate prison law library as reasonably necessary. Any prisoner denied direct access to the law library for documented reasons of security shall be permitted to order at least five books per week from that library. Books so ordered shall be

> delivered promptly and without fail. Each prisoner assigned to segregation shall be provided upon request with a complete listing of all books available in the prison law library and all books, if any, available to prisoners from other sources.
>
> Id. at 1424, Pl.App. 341.

The Ninth Circuit sustained the district court's findings that the paging system was inadequate, and held that the paging system remained inadequate even as "improved" by the district court. 801 F.2d at 1108-1110, Pl.App. 116-124. Noting that the district court's allowance of "a limited use of the paging system merely recognizes defendants' interest in institutional security," Id. at 1109 (Pl.App. 120), the Ninth Circuit held that the great weight of authority supported plaintiffs' request for legal assistance for all prisoners denied physical access to the law libraries,

id. at 1110 (Pl.App. 122-24). The Ninth Circuit held therefore that:

> all prisoners are entitled to meaningful access to the courts. If the state denies a prisoner reasonable access to a law library, the state must provide that prisoner legal assistance. If the parties fail to agree on a plan that provides meaningful access to the courts, the district court shall fashion one that comports with the requirements established this opinion.
>
> Id. at 1110, Pl.App. 124 (emphasis in original).

Proceedings are presently occurring before the district court and its Monitor, pursuant to the Ninth Circuit's mandate; and no new legal access remedy has yet been agreed to or imposed.

The defendants appear to argue in their Petition for Writ of Certiorari that the improved paging system ordered by the district court will provide constitutionally adequate access to the

courts for all lockup inmates. Defendants' Petition at 19-21. Defendants also appear to argue that the Ninth Circuit opinion goes beyond Bounds by forcing them to provide plaintiffs with "both, rather than one, of the alternative options presented by Bounds." Id. at p. 21. Finally, defendants appear to suggest that plaintiffs in the instant case are less deserving of the court access right than most or other inmates. Id. at 17-18, 21-22.

In fact, however, as the Ninth Circuit concluded, the paging system alone does not provide constitutionally adequate access for the lock-up prisoners whose rights are the subject of this case. Moreover, neither the Ninth Circuit, the district court, nor the district court's Monitor has yet ordered a new library access remedy, much less

any mixture of Bounds alternatives. And, the defendants' attempt to distinguish the constitutional legal access rights of lock-up inmates from those of other inmates is inappropriate under the Bounds standards. See 430 U.S. at 828-32.

In implementing this Court's decision in Bounds the lower federal courts have held that defendants bear the burden of proving that their provisions for legal research or legal assistance are adequate. Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981); Ramos v. Lamm, 639 F.2d 559, 583-85 (10th Cir. 1980); Cruz v. Hauck, 627 F.2d 710, 719 (5th Cir. 1980). In the instant case, defendants did not meet their burden of showing that a "paging" system is adequate.

Numerous courts have analyzed why paging systems such as those at San Quentin and Folsom are incapable of providing meaningful access to the courts. As one court stated:

> Simply providing a prisoner with books in his cell, if he requests them, gives the prisoner no meaningful chance to explore the legal remedies he might have. Legal research often requires browsing through various materials in search of inspiration .... It is unrealistic to expect a prisoner to know in advance exactly what materials he needs to consult. It is completely unrealistic to expect lay persons to know the names of the law books they will need for research on a legal problem, so that these can be requested from a guard.
>
> Williams v. Leeke, 584 F.2d 1336, 1338-39 (4th Cir. 1978), cert. denied, 441 U.S. 911 (1979).

Accord Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985); Rich v. Zitnay, 644 F.2d 41, 43 (1st Cir. 1981);

Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980); Kendrick v. Bland, 586 F.Supp. 1536, 1557 (W.D.Ky. 1984) (paging system inadequate even with telephonic counsel of inmate legal aids); Martino v. Carey, 563 F.Supp. 984, 1003-1004 (paging system is a "Catch 22").

Consequently, the Bounds' requirement of adequate access to law libraries has been interpreted by the majority of lower courts to require physical access, except where prisoners have the alternative of access to in-person assistance from qualified individuals trained in the law. Kendrick v. Bland, 586 F.Supp. 1536, 1549-1562 (W.D.Ky. 1984). Accord Green v. Ferrell, 801 F.2d 765 at 772 (5th Cir. 1986); Morrow v. Harwell, 768 F.2d 619, 623 (5th Cir. 1985);

Corgain v. Miller, 708 F.2d 1241, 1248-50 (7th Cir. 1983); Williams v. Leeke, supra, 584 F.2d at 1338-1339; Martino, supra, 563 F.Supp.a t 1003-1004; Canterino v. Wilson, 562 F.Supp. 106, 110 (W.D.Ky. 1983); see also Cepulonis v. Fair, 732 F.2d 1, 5-6 (1st Cir. 1984).[1/]

1/ In fact, many cases upholding "paging" systems did so in the context of factual findings that inmates also had access to the assistance of persons trained in the law. Williams v. Wyrick, 747 F.2d 1231, 1232 (8th Cir. 1984) (appointed lawyer and paralegals); Lovell v. Brennan, 566 F.Supp. 672, 696 (D.Maine 1983) (attorney and paralegals); Frazier v. Ward, 426 F.Supp. 1354, 1356, 1371 (N.D.N.Y. 1977) (attorneys). Indeed there is ample precedent that in particular cases a mixture of library access and/or paging and legal assistance may be appropriate depending on the specific facts of the case. Cepulonis v. Fair, 732 F.2d 1, at 6 (1st Cir. 1984); Smith v. Bounds, 610 F.Supp. 597, 603 (E.D.N.C. 1985); ___ F.Supp. ____ (E.D.N.C., April 10, 1986 Civ. Nos. 3052, 4277 and 790), affirmed ____ F.2d ____, (4th Cir. March 20, 1987 No. 86-7579).

The district court concluded in 1983 that there were "serious questions" as to the constitutionality of defendants' paging system. Hence, the preliminary injunction issued that year and sustained by the Ninth Circuit ordered the defendants to provide reasonable opportunities for the study of law books. Toussaint v. Rushen, supra, 553 F.Supp. at 1373-74, 1380, 1385 (Pl.App. 468-69, 505, 530-31). At the time of trial, the district court found defendants' then-current library access practices constitutionally deficient. Toussaint v. McCarthy, 593 F.Supp. at 1403, 1413 (Pl.App. 231-33, 285-87). Where there have been such violations of prior court orders, additional relief is permissible. See, e.g., Cruz v. Hauck, 627 F.2d 710, 720-21 (5th Cir. 1980). See also, Bounds on remand.

Finally, Defendants' claimed conflict between the Ninth Circuit and the Seventh and Eleventh Circuits does not exist. Plainly, the appropriate remedy for denial of access turns largely on the unique facts and circumstances in the record of each case. Ramos v. Lamm, 639 F.2d 559, 583 (10th Cir. 1980) cert. denied, 450 U.S. 1041 (1981); Walters v. Thompson, 615 F.Supp. 330, 340 (D.C.Ill. 1985). Within the framework of this case-by-case analysis, the circuit decisions cited by defendants do not conflict with each other, nor does the Ninth Circuit holding in the instant case in any way conflict with Bounds itself.

On the facts of Hooks v. Wainwright, 775 F.2d 1433 (11th Cir. 1985) the Eleventh Circuit simply held that the district court in Florida had overreached its authority when it "held that any

acceptable plan for assuring Florida prisoners meaningful access to the courts as required by Bounds [citation omitted], must include a provision for the assistance of counsel." Id. at 1433 (emphasis in original). Neither the district court here, nor the Ninth Circuit, has made such a broad ruling. The Ninth Circuit merely has remanded, given the record in this case, for the district court to order a plan that provides meaningful access through physical access for all lockup inmates to an adequate law library and/or legal assistance. The actual plan is presently being litigated in the district court. All that is final on this issue at this point is the Ninth Circuit's determination, based on the record made in the district court, that the defendants' paging system, even as

improved by the district court, is constitutionally inadequate.

Similarly, the Seventh Circuit's recent decisions involving law library access by federal lock-up inmates and federal general population inmates in lock-down status at the United States Penitentiary at Marion, Illinois do not evidence a conflict with the Ninth Circuit.[2/]

2/ Arsberry v. Sielaff, 586 F.2d 37 (7th Cir. 1978), decided approximately a year after Bounds, contains no reasoned discussion of law library access issues or facts, and merely recognizes the truism that even after Bounds "the Supreme Court gives substantial leeway to the discretion of prison authorities in this regard." 586 F.2d at 44. Plainly the Ninth Circuit has properly considered the appropriate amount of discretion to be afforded the defendants in this case, who for years have been operating unconstitutional lock-up units and violating court orders concerning law library access and other subjects, and who have been found to be unable to

(Footnote Continued)

In both Campbell v. Miller, 787 F.2d 217 (7th Cir. 1986) and Caldwell v. Miller, 790 F.2d 589 (7th Cir. 1986) there were no findings of inadequacy of paging systems, or of inadequate physical access either to unit or to prison-wide libraries. There also was no evidence of past violations of court orders concerning legal access. On the records before it, the Seventh Circuit was simply adopting "the conclusion reached by the Ninth Circuit in Lindquist v. Idaho State Board of Corrections, 776 F.2d 851, 858 (9th Cir. 1985):

> '[T]he Constitution does not guarantee a prisoner unlimited access to a law library. Prison officials of necessity must regulate the time, manner, and place in which library facilities are used .... The fact that an inmate must wait for a turn to

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(Footnote Continued)

operate a constitutionally adequate paging system.

> use the library does not necessarily mean that he has been denied meaningful access to the courts.'"
>
> Campbell, supra, 787 F.2d at 227.

Given the Ninth Circuit's general position on law library access issues, as stated in Lindquist and specifically adopted by the Seventh Circuit, there is no conflict between these Circuits or between the Ninth and Eleventh Circuits. Further, this Court should not grant the Defendants' Petition to address law library or court access issues that are still unripe in this case, and that are fact intensive in any event.

CONCLUSION

On the record of this case, Defendants' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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